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Punishment And Purpose ~ From Moral Theory To Punishment In Action

Contents

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Punishment And Purpose – Introduction

In Anthony Burgess's *A Clockwork Orange* (1972), after spending some time in prison, young delinquent Alex is treated with the revolutionary Ludovico's technique. With this new technique a violent criminal can be effectively reformed within a fortnight. Ludovico's technique is happily embraced and advocated by the government that hopes to win the coming elections by boasting of the way it has effectively dealt with crime. As a result of the treatment, "the intention to act violently is accompanied by strong feelings of physical distress. To counter these the subject has to witch to a diametrically opposed attitude" (p. 99). In short, Alex is being impelled towards the good as a mechanical result of his inclination towards evil. Although as a result of his treatment Alex ceases to be a creature capable of moral choice, government officials stress that their main concern is with cutting down crime and relieving the congested prison system and not with higher ethics. After the treatment is successfully completed, Alex is released back into society. When he returns home to his parents, he finds that his personal belongings have been sold by the police in order to compensate his victims. He also finds himself rejected by his grief-stricken parents who now have a lodger, Joe, staying in Alex's room. Joe is like a new son to Alex's parents. He makes clear to Alex that it is only right he should suffer further because he has made others suffer in the past. Now homeless and, as a result of his treatment, incapable of defending himself, Alex is abused as an act of revenge by one of his victims from the past whom he encounters in the public library. Alex's newly found 'freedom' has become unbearable to him and he wants 'to snuff it'.

The story of Alex in 'A Clockwork Orange' incorporates a number of important

issues related to the morality, legitimacy and goals of punishment that are still of relevance to the contemporary practice of legal punishment. It involves issues of moral choice and free will, criminal politics, interests of victims, revenge, proportionality in punishment and the uneasy relation between reformation and retribution. To date, these issues continue to be subject to fundamental differences of opinion. Legal punishment is considered a means of dealing, in a suitable and just way, with those who infringe legal rules. However widely accredited such a view may be, it nevertheless begs the fundamental question of what should be considered as suitable and just punishment. The answer to this question is not immediately evident and yet, the practice of punishment needs a moral justification since punishment itself is morally problematic (Duff & Garland, 1994). Punishment involves a deliberate and avoidable infliction of suffering (Honderich, 1970). It involves actions, such as depriving a person of his or her freedom that, if not described and justified as legal punishment, would be considered to be wrong or evil (Cavadino & Dignan, 1997; Hart, 1963; Sullivan, 1996). Thus, while the institution of legal punishment is perceived by most as a self-evident part of society, it nevertheless needs a sound moral justification. From a moral point of view therefore, we would expect the practice of legal punishment to reflect a solid and commonly shared legitimising framework. Such a framework involves answers to questions relating to the justification and goals of punishment.

Irrespective of the specific legal system within which they are operating, criminal justice officials frequently clarify, justify and rationalise their institution and the concrete practice of punishment by referring to legitimising aims and values from moral theories of punishment. Moreover, we expect moral theory to serve as a critical standard for the practice of punishment (Duff & Garland, 1994). Closer inspection of sentencing practice, however, suggests that, though a link between (moral) theory and practice may well be present, it is not as evident or straightforward as one might expect or wish. A multitude of justifications and goals of punishment exist. Moreover, they appear to be employed in ever changing priorities and mixes. This may be explained, at least partially, by the fact that the justification and goals of punishment may be highly dependent on place, time and personal preferences (cf. Kelk, 1987). However, such an explanation can neither refute the expectation that the practice of punishment should reflect a consistent underlying legitimising framework nor invalidate the necessity of these issues being subject to continued reflection. Different

theoretical and philosophical approaches have different implications for the actual practice of punishment and may even be in conflict amongst one another. The best known and most influential approaches include Retributivism and Utilitarianism. Retributivist theories are retrospective and non-consequential in orientation. For them the general justification for punishment is found in a disturbed moral balance in society; a balance that was upset by a past criminal act. Infliction of suffering proportional to the harm done and the culpability of the offender is supposed to have an inherent moral value and to redress that balance. Utilitarian theories are forward-looking. Legal punishment provides beneficial effects (utility) for the future that are supposed to outweigh the suffering inflicted on offenders. The future good in the utilitarian approach is served by the reduction and prevention of crime. This utility may be achieved, through punishment, by individual and general deterrence, incapacitation, rehabilitation and resocialisation and the affirmation of norms. More recently, there has been a growing interest in the literature as well as within the criminal justice system itself regarding the position of the victim in criminal proceedings and in the role of restorative justice as an alternative criminal justice paradigm (cf. Bazemore & Feder, 1997; Malsch & Kleijne, 1995). Restorative justice emphasises the importance of conflict-resolution through the restitution of wrongs and losses by the offender.

The victim of a crime and the harm suffered play a central role in restorative justice. The main objective is not to punish, nor to re-educate, but to repair or compensate for the harm caused by the offence (Walgrave, 1994). The victim, the offender and the community are expected to be maximally involved in the restorative process (Bazemore & Maloney, 1994).

These moral theories of legal punishment explicitly aim at providing legitimising frameworks for the practice of legal punishment. The purpose of the present study is to determine whether or not a consistent legitimising framework founded in or derived from these moral theories underlies our institution and practice of legal punishment. In essence therefore, the study is about the link between the supposed justifications and goals of punishment and the actual practice of punishment. The outlook and subsequent shape of the study is determined by three interlocking building blocks. The first involves theoretical and philosophical perspectives on the justification and goals of punishment. The second is the theoretically integrated measurement of penal attitudes. The third and final

building block is the examination of punishment in action by means of a scenario study. The existence of a variety of theoretical and philosophical approaches towards the justification, functions and goals of punishment (the first building block) is in itself no guarantee that the practice is morally justified. Perhaps, in practice, moral theory of punishment merely serves as a convenient pool of rationalisations to be drawn from eclectically (cf. Duff & Garland, 1994). We must be able to show the relevance of such justifications for the practice of punishment. A first step in establishing this empirical relevance is the measurement of penal attitudes in a manner consistent with moral theory (the second building block). As such, it must be shown that the central concepts derived from moral legal theory are meaningful and consistently measurable among criminal justice officials.

If there is a legitimising (moral) view or framework underlying the practice of punishment today, it should somehow be reflected in the minds of the sentencing judges. Furthermore, the examination of penal attitudes and their underlying structure is important for demonstrating how abstract theoretical concepts become translated into practice and how they interrelate in the perception of judges in criminal courts. Apart from measuring abstract penal attitudes and exploring the underlying structure, studying the relevance of moral legal theory for the practice of punishment involves yet another important aspect. This requires an exploration of the relevance and consistency of theoretically derived goals at sentencing in concrete criminal cases (the third building block).

In Chapter 2 the (moral) value of philosophies and theories of punishment is considered. Subsequently, the chapter provides a concise overview of the various approaches to the justification and goals of punishment. Due attention is paid to the main issues and controversies that shape the theoretical debate. Chapter 3 focuses on the attitude concept in general and penal attitudes in particular. Different approaches to the measurement of penal attitudes are discussed and illustrated with a number of relevant studies. Chapter 4 reports on the development of a measurement instrument for measuring penal attitudes among Dutch judges. Conceptualisation and operationalisation of the moral theories of interest are described after which the chapter proceeds to report on the results of two studies with Dutch law students. Data obtained from these students are employed to develop and refine a theoretically integrated model of penal attitudes. This model is subsequently examined with data collected from judges in

Dutch criminal courts. Before doing so, however, Chapter 5 provides a brief judicial intermezzo in which the legal context of the study with Dutch judges is explained. Relevant aspects of the organisation of Dutch criminal courts, the Dutch sentencing system and the discretionary powers of Dutch judges are discussed briefly. In Chapter 6, the procedure and results of the first study with judges in Dutch criminal courts are described. It involves the measurement of penal attitudes and the subsequent estimation of the theoretically integrated model that was developed with data from the Dutch law students. While this first study with judges focuses on measuring and modelling penal attitudes independent of specific criminal cases, a further scenario study is carried out to explore punishment in action. Chapter 7 elaborates on the development of the scenario study. This study is designed to examine variation in preferred goals of punishment as well as in sentencing decisions in specific criminal cases. Its further aim is to determine the consistency and relevance of goals of punishment with respect to sentencing decisions. The relevance of penal attitudes for preferred goals at sentencing is also explored. The chapter describes a number of practical and methodological issues related to this type of study. Subsequently the design of the scenario study and the selection of suitable vignettes are discussed in the light of results from the penal attitude study. In Chapter 8, the procedure and results of the scenario study are reported. In the final chapter, Chapter 9, the main conclusions of the study are reiterated and briefly discussed.

Punishment And Purpose ~ The Theoretical Debate

2.1 *Introduction*

In one of his essays, John Stuart Mill noted that even if we admit the legitimacy of inflicting punishment, many conflicting conceptions of justice regarding the proper apportionment of punishment to offenders come to light (Mill, 1867). This statement touches the core of what theories and philosophies of punishment are about. This

chapter discusses the various ways that the State's reaction to offending can be legitimised as well as the subsequent goals that could guide this reaction. A number of theoretical and philosophical approaches exist that consider legitimacy and goals of punishment in depth. Each approach has its own theoretical and practical problems. Although the different approaches are often mutually exclusive, there have been attempts to compromise.

The theoretical and philosophical debates on the justification and goals of punishment that have ensued, cover a vast area of social, political and legal thinking. This chapter aims at providing a concise overview of the various approaches.**[i]** It aims to highlight the key arguments from the most influential approaches, frequently by discussing the works of influential writers in these fields.

In Section 2.2, the relevance of philosophies and theories of punishment is discussed. In Section 2.3, the different approaches are categorised under the headings of retributivism, utilitarianism, restorative justice and mixed approaches. In the subsequent sections, 2.4 through 2.7, each category is discussed in some detail. The ideas of several influential writers are presented for illustrative purposes and different directions within each category, each with their own merits and problems, are briefly touched upon.

2.2 *The need for philosophies and theories of punishment*

Crime threatens our personal safety, our property and ultimately the social coherence of society. We consider criminality to be a serious and urgent national problem (cf. Sociaal Cultureel Planbureau, 1998). Our fear of crime not only stems from the direct threats it poses to us, but also from the general feelings of insecurity that result from the awareness of its existence. Crime exerts external influences on our lives over which we feel we have little or no control (Steenstra, 1994). In an era of mass communication and extensive media coverage of crime, such an awareness is inescapable.

One way of guarding the rules that keep society together and providing us with (a sense of) security, is through the institution of legal punishment: a means by which suitable and just reactions are meted out to those who infringe the rules. The institution of legal punishment has become such a self-evident and intrinsic part of our lives that we even demand a justification for its absence in cases where we expect it (Tunick, 1992). Punishment is a diverse concept. In principle,

however, most people would agree on a description of punishment that incorporates the following seven features formulated by Walker (1991, pp. 1–3):
1. It involves the infliction of something that is assumed to be unwelcome or unpleasant for the recipient.
2. The infliction is intentional and done for a reason.
3. Those who order it are regarded as having a right to do so.
4. The occasion of the infliction is an action or omission which infringes a law, rule or custom.
5. The person punished has played a voluntary part in the infringement.
6. The punisher's reason for punishing is such as to offer a justification for doing so.
7. It is the belief or intention of the person who orders the infliction, and not the belief or intention of the person undergoing it, that settles the question whether it is punishment.

These features, however, are not necessarily limited to the practice of legal punishment; they might as well characterise a parent's reaction to a child's wrongdoing. Kelk defines punishment as a well-considered, intentional and avoidable infliction of suffering on someone, for a culpable act that deserves blame in order to reach (a) certain goal(s) (Kelk, 1994b, p. 16). He subsequently identifies four domains in the context of which punishment is to be considered. The first is within the framework of criminal law. The second domain involves legal areas other than criminal law, such as disciplinary law, administrative law and civil law. The third context within which penal actions can be identified is in public life (i.e., on the streets, in shops, public parks). The fourth and final domain is within the framework of intermediary social groups in society, such as the family, work or school. Within the frame of reference of the present study, the terms punishment and legal punishment are used to refer to penal actions in the context of Kelk's first domain: actions within the domain of criminal law.**[ii]**

As mentioned above, we expect legal punishment to be suitable and just. According to Walker's features of punishment, it is done for a reason and those who order it are supposed to have a right to do so. But what is to be considered as suitable and just punishment? Although the institution of legal punishment is self-evident and a fact of life in the eyes of most people, the answer to such a fundamental question is not so evident and consequently, the practice of punishment needs a moral justification that addresses such questions. A

justification is required because punishment itself is morally problematic (Duff & Garland, 1994). It is "a deliberate and avoidable infliction of suffering" (Honderich, 1970, p. 7). It involves actions that are generally considered to be morally wrong or evil were they not described and justified as punishment (such as depriving a person of his or her freedom) (see, Cavadino & Dignan, 1997a; Duff & Garland, 1994; Hart, 1963; Hazewinkel-Suringa & Remmelink, 1994; Sullivan, 1996). Even the very threat of legal punishment requires a justification because "it is itself the infliction of a special form of suffering – often very acute – on those whose desires are frustrated by the fear of punishment" (Hart, 1963, p. 22). Next to a justification of the general practice of punishment, we need to have consistent ideas on whom to punish, and how to punish (Hart, 1968).**[iii]** So when we do have a moral justification for the practice in general, what exactly do we wish to achieve when meting out punishment in concrete cases? These are the issues that are dealt with by the philosophy and theory of punishment.**[iv]**

The distinction between the general justification of the practice of punishment and the specific aims of punishment in concrete cases is essential for a good understanding of the different philosophical and theoretical approaches (Jörg & Kelk, 1994). Another way to describe this distinction is to separate purposes of sentencing from purposes at sentencing (Morris & Tonry, 1990). While, in the different approaches, the general justification of the practice of punishment is always a normative matter, the purposes at sentencing can be handled in a descriptive or prescriptive manner. Both types of purposes, however, are continuously subject to debate.

Different philosophical theories of punishment offer different accounts of why we punish, whom to punish and what the objectives of punishment should be. Although we do not expect judges and other officials involved in everyday practice to justify all their decisions in these terms, philosophical theories of punishment provide rationalisations for the practice of punishment in most discussions on the subject. Besides this, we expect normative accounts of punishment to form the basis of a systematic and consistent sanctioning practice. They set a critical standard against which the practice of punishment can be measured and scrutinised on a regular basis (Duff & Garland, 1994). It may be naive, however, to expect an explicit unified philosophical theory of punishment to govern both the justification of punishment and the aims at sentencing for all people involved, in each and every case. In practice, elements of different philosophies may be

implicit and combined both at the level of purposes of sentencing (general justification) and at the purposes at sentencing (aims). The exact form of such combinations may be determined by eclectic considerations depending on specific characteristics of the offence, the offender, and the sentencing judge. As a result of such a gap between theory and practice, the descriptive value of any single philosophical theory of punishment for the justice system as a whole may be limited. They can play an important role, however, in the analysis of specific decisions and should continue to play the role of critical standard. Theories can (and should) bind the practice of punishment to a certain order and regularity (Janse de Jonge, 1991).

2.3 *Categorisation of philosophical theories*

In order to gain more insight in the variety of philosophical theories and yet narrow down the number that needs to be discussed for the purpose of the present study, it would be useful to categorise them. Several possibilities for categorising are available. A first general and useful categorisation is that resulting from the distinction between immanent and radical critics of the practice of punishment (see also Hudson, 1996; Tunick, 1992). The logic of this distinction can be clarified through an argument made by Rawls. Rawls pointed to "the importance of the distinction between justifying a practice and justifying a particular action falling under it" (Rawls, 1955, p. 3). Tunick suggests that a theorist of legal punishment is either an immanent critic or a radical critic of the practice. An immanent critic of punishment accepts the institution of legal punishment, seeks a sound moral justification for it and uses this as a critical standard against which to test the actual practice of punishment. The radical critic, on the other hand, questions the existential foundation of the institution of legal punishment. In Tunick's words:

The radical critic in effect denies that there can be a sufficient justification for any action that is part of the practice; she concludes that the whole practice, root and branch, serves no good purpose, or perhaps a malign one. In contrast, the immanent critic might reject particular justifications that are given within the practice but accepts that in principle actions within the practice can be justified. (…) The theorist who assumes the role of immanent critic is, then, situated inside the practice (Tunick, 1992, p. 18).

From a theoretical point of view, the starting point of any philosophy concerning a social phenomenon should be radical/existential in nature. The fact that a practice

exists does not *necessarily* mean that it is, or can be, justified in its present form, although this might have been the case in the past. The mere existence of the practice of punishment may not be used to dismiss reflection on its necessity (Hazewinkel-Suringa & Remmelink, 1994, p. 887). A radical critique on immanent theories, therefore, is that they compete with each other for the 'best' rationale of punishment without asking these more fundamental questions (Doyle, 1995), thereby overlooking possible alternative ways (other than penal policy) for promoting disciplined conduct and social control (Garland, 1990, p. 292). One of the consequences of competing and changing immanent rationales is confusion as to the 'true' rationale and meaning of the concept of punishment. About a century ago, Nietzsche pointed to this very problem when he stated that the continuous adaptation to the most varied uses has caused the concept of punishment to become undefinable. It therefore has become impossible to explain *why* people are punished. (Nietzsche, 1887/1994, second essay – Section 13).

There are radical critics who are not so 'pure' in their radicalism but who cannot be labelled as immanent critics either. The distinction between immanent and radical critics is therefore obviously not always clearcut. Although abolitionist theorists, for instance, have long-term radical goals (e.g. Bianchi & van Swaaningen, 1986; Christie, 1977; Christie, 1981; de Haan, 1990; Hulsman, Bernat de Celis, & Smits, 1986), their *short-term* engagement since the 1980's is more that of immanent critics (e.g. Van Swaaningen, 1992). This, presumably, is the best strategy in order to have some chance of long-term radical achievements. Modern abolitionists aim for a *transformation* of criminal law in what they call reparative law (see, Bianchi, 1986); they aim to break away from the conditioned reflex that affirmation of norms should be effectuated in a punitive way (Boutellier, van Swaaningen, Lippens, van de Bunt, & Huisman, 1996). The point of departure for any transformation is (by definition) an immanent one. Immanent elements of such 'transitional' theories could therefore be useful in the analysis of positions within the existing system of criminal justice.

Since the present study deals with attitudes and decisions of magistrates in the Dutch penal system, the discussion of philosophical theories of punishment will be limited to those that could have some practical relevance for the analysis of the attitudes and behaviour of officials *within* the established system of criminal justice. Theorists who could be labelled as 'pure radical critics' according to the description given above, will therefore not be considered extensively in the

present context. This leaves us with philosophical theories that either have an immanent or a transitional character. An important instance of such system-transitional approaches, which over the last few years has (re)gained attention among theorists and reformers, is that of *restorative justice*. The restorative approach tries to break away from 'punitive thinking' and emphasizes the importance of conflict-resolution through the restitution of wrongs and losses. The victim of a crime plays a central role in restorative justice. The immanent theories can be divided in two groups/categories of philosophical theories: *retributivism* and *utilitarianism*. Although there are several criteria possible for making the distinction between utilitarian and retributivist theories, the most prominent difference between the two groups of theories is in their temporal perspective. Utilitarian theories are forward-looking. The justification for the practice of legal punishment is found in its supposed beneficial effects (utility) for the future. This utility outweighs the suffering inflicted on offenders by the act of punishment. Utilitarian theories are, therefore, often called consequentialist or instrumentalist theories. Some authors prefer the term 'reductivism' as a specific form of utilitarianism because the focus is on the reduction of crime (e.g. Cavadino & Dignan, 1997a; Walker, 1985). Retributivist theories, on the other hand, are retrospective and non-consequentialist. The justification for the practice, in many retributivist accounts, is found in a disturbed (moral) balance in society; a balance that was upset by a past criminal act. The act of punishment in itself is just, deserved and morally good since it is supposed to redress that balance. A second way to distinguish between utilitarianism and retributivism is by putting utilitarianism in the class of teleological theories and retributivism in the class of deontological theories. In the teleological view, an action must be justified by its consequences; an action must serve some good in society. In the deontological view, on the other hand, actions are not justified by their consequences, but rather by their intrinsic (i.e., independent from any future consequences) moral value.

Both utilitarianism and retributivism have been called groups or categories of philosophical theories. The reason behind this is that both terms represent a whole gamut of refinements and different directions but still fit under the general header of either label. In the descriptions of retributivism and utilitarianism given below, due attention will be paid to such differentiations, although the focus will remain on the most important premises of these accounts of legal punishment.

As will be shown, elements from utilitarianism and retributivism can be combined or mixed to form so-called hybrid accounts of punishment. Although such hybrid accounts do not offer any essentially new theoretical insights, they are interesting and relevant alternatives for pure retributive or utilitarian reasoning. Hybrid accounts appeal to many because inherently one type of reasoning is moderated by the other.

Table 2.1 Schematic representation of theoretic accounts of punishment

system orientation		
IMMANENT	Retributivism § 2.4	} mixed § 2.6
	Utilitarianism § 2.5	
TRANSITIONAL	Restorative Justice § 2.7	

Table 2.1 Schematic representation of theoretic accounts of punishment

Table 2.1 schematically presents the approaches that will be discussed in more detail in the following sections of this chapter. It is important to bear in mind that the following sections do not attempt to offer a complete and exhaustive overview of the various theoretical and philosophical directions. Rather, the objective is to offer a concise account of the core arguments that are considered relevant within the framework of the present study.

2.4 *Retributivism*

Although there are many versions of retributivist accounts of punishment, the unifying theme is that punishment of wrongdoers is *intrinsically* good. Justice should be done without pretensions for any future utility. Punishment has an inherent moral value as a reaction to past wrongdoing that needs no justification in terms of future beneficial effects (Duff, 1996). Questions as to where the moral necessity for punishment lies, or rather why the particular action of punishment (deliberately inflicting suffering on wrongdoers) is the appropriate and required response to wrongdoing, are answered differently by various retributivists. Frequently the answers to these particular questions can be interpreted in utilitarian (teleological) terms, thereby rendering some retributivists vulnerable to the 'accusation' of being 'crypto-utilitarians'**[v]** (Walker, 1991). Indeed, "sometimes the differences among retributivists seem greater than the

differences between some utilitarians and some retributivists" (Tunick, 1992, p. 67). For present purposes however, it will neither be necessary to settle that debate, nor to choose sides.

2.4.1 *Negative and positive retributivism*

An important first distinction is that between negative and positive retributivism. Negative retributivism is defined by two rules:

1. Only the guilty can be punished
2. The guilty can only be punished to the extent of their desert (moral culpability) (Duff & Garland, 1994, p. 7).

The principle laid out by these two rules is what Hart calls 'retribution in distribution' (Hart, 1968). Relying on this negative principle of retributivism means that punishment is not a necessary response to crime; it is permissible but only to the extent regulated by the two rules. The principle is a negative principle because its purpose is to restrict (limit) punitive action. The fact that theories of this kind are called retributive lies in their adherence to proportionality in punishment. An offender who has been found guilty, may not be punished more severely (as one might wish, for instance, with instrumental aims in mind) than the seriousness of the offence and his culpability permit. Nor may an innocent person be punished to deter potential offenders.

For retribution in distribution the general justifying aim of punishment need not even be retributive (Hart, 1968, p. 9). It is, therefore, not surprising that the principles of negative retributivism are often found in combination with utilitarian elements, for instance as a limiting (negative) principle in consequentialist accounts of punishment (e.g. Duff, 1996; Morris, 1974; 1992). Such theories are classified as mixed theories or hybrid accounts of punishment; they will be discussed in Section 2.6. Positive retributivism attempts to offer a more complete account of punishment than negative retributivism which can only operate in combination with a general justification (utilitarian or retributivist). The positive retributivist holds that 'justice' demands punishment to be meted out; punishment of wrongdoers is required by certain principles of justice. In the view of true positive retributivists, it is not only permissible to punish up to the limit indicated by the negative principle, it is even a duty to do so (Walker, 1985, p. 108).

The classical formulation of positive retributivism was given by Kant. Kant's most explicit writings on punishment are found in the Doctrine of Right, the first

section of his Metaphysics of Morals (Kant, 1797/1991). Kant, however, seemed more concerned with the 'dangers' of utilitarianism (in the form postulated by his contemporary Bentham) than with formulating a thorough and complete account of punishment. His retributive theory, therefore, is sketchy (Von Hirsch, 1992a, p. 65) and open to multiple interpretation. Kant, like many positive retributivists after him, insists that humans, rational beings capable of moral understanding, should never be treated as a means to promote some future good, neither for themselves nor for society at large. Punishment, in Kant's view, is a categorical imperative, a moral necessity without any reference to possible consequences (good or bad). A wrongdoer should be punished because he has done something morally reprehensible, because he has committed a crime and for no other reason. In answer to the question of what kind and what amount of punishment should be inflicted, Kant refers to talionic measures (he equates his law of retribution to *lex talionis*):
Accordingly, whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you kill him, you kill yourself (Kant, 1797/1991, p. 141).

The question of why wrongdoers deserve *punishment* instead of some other (non-punitive) reaction to their actions remains unanswered by Kant. For the positive retributivist, the moral necessity to punish must lie in the retributive general justification for the practice. It is to this general justification, the explanation of why punishment is the intrinsically appropriate and deserved response to crime, that we now turn.

2.4.2 *The intuitionist approach*

There is one very straightforward, but not very enlightening, retributive general justification for the practice of punishment that relies on intuition. The argument simply is that a guilty person should be punished because he deserves it. Drawing on our emotions of love and hatred, we *feel* that he deserves it.**[vi]** Although such an argument appeals to our *sense* of justice and emotions of revenge, which the intuitionist retributivist holds we all share (e.g. Moore, 1987), it does not provide a clear theoretical argument as to why punishment (the infliction of suffering) is the appropriate and required response to crime. If we are to distinguish retribution from mere revenge**[vii]**, we need *objective* criteria to justify it. Relying on intuition in order to justify the practice of punishment is quite reductionistic, if

not a fallacy, since the question that was supposed to be answered is why a person deserves punishment (Clear, 1996; Honderich, 1970, pp. 4,15). Such a question cannot satisfactorily be answered with: 'Because we feel that it is deserved'. Over and above, we should pose the question of where we get this intuition. Where lies the origin of this feeling that punishment is deserved? Could it be that it "is really a learned reaction to offending rather than an inborn intuition" (Walker, 1991, p. 72)? The intuitionist should then be able to show that the feeling of deservedness and the inclination to punish is a 'natural' feeling with which we are born. The retributivist who appeals to our intuition and collective inclination to punish as justification for the practice, can, however, not be accused of being a 'utilitarian in disguise' since there is no reference whatsoever to any future benefits of punishment. Although few philosophers explicitly stick to a purely intuitionist justification, any moral justification of punishment that presupposes the existence of objective moral values implicitly contains intuitionist elements that make it prone to discussion.**[viii]**

2.4.3 *Restoring a balance*

Most positive retributivists, in one way or another, refer to a balance in society that can be disturbed by the act of crime. Punishment, in their view, is the required response to offset the disturbed balance. The act of punishment is purely retrospective and has an inherent moral value (the deontological argument). One classical type of balance-restoration stems from Hegel. According to Hegel, punishment should be meted out in order to cancel the 'negation of right' brought about by a crime, *to return to a previous state of affairs* (Honderich, 1970, p. 35). Punishment, in other words, is to *annul* a crime.

In Hegel's own words, punishment of an offender:
(…) *is to annul the crime, which otherwise would have been held valid, and to restore the right (Hegel, 1821/1967, p. 69). Objectively, this is the reconciliation of the law with itself; by the annulment of the crime, the law is restored and its authority is thereby actualized. Subjectively, it is the reconciliation of the criminal with himself* (…) (Hegel, 1821/1967, p. 141).

Although annulment may have a ritual function, as Nigel Walker points out, the fact that punishment has been meted out is, in the eyes of the victims, not equivalent to the crime not having been committed. "Victims can be compensated, but not unraped or unmugged" (Walker, 1991, p. 74). Hegel, however, was more concerned with abstract moral notions of right rather than with concrete

compensation to victims in specific cases. An omission in Hegel's account is that he leaves largely unanswered the question of how, and how much to punish.**[ix]** However, while pointing to the absurdity of talionic measures, he does indicate that punishment should (in some way) be equivalent to the qualitative and quantitative characteristics of the crime (Hegel, 1821/1967, pp. 71–73).**[x]** Furthermore, as a true positive retributivist, Hegel insists (like Kant) that humans should never be treated as a means to an (utilitarian) end:
To base a justification of punishment on threat is to liken it to the act of a man who lifts his stick to a dog instead of with the freedom and respect due to him as a man (Hegel, 1821/1967, p. 246).

Another influential positive retributivist approach views punishment as a means to restore the balance of *benefits and burdens* in society. Our system of rules (i.e., criminal law), the argument goes, supplies us with benefits by protecting us from harmful actions such as violence and deception. It defines a sphere for each person "which is immune from interference by others" (Morris, 1968, p. 477). In order to enjoy these benefits, everyone must exercise the burden of self-restraint over inclinations that would interfere with that sphere of immunity. Failure to exercise self-restraint would result in an unfair advantage. In Morris's words:
If a person fails to exercise self-restraint (…) he renounces a burden which others have voluntarily assumed and thus gains an advantage which others, who have restrained themselves, do not possess (Morris, 1968, p. 477).

Punishment would be the just and required reaction to those who have acquired such an unfair advantage, because:
Matters are not even until this advantage is in some way erased. Another way of putting it is that he owes something to others, for he has something that does not rightfully belong to him. Justice– that is punishing such individuals– restores the equilibrium of benefits and burdens by taking from the individual what he owes, that is, exacting the debt (Morris, 1968, p. 478).

In 1976, Andrew Von Hirsch endorsed this theory as a (partial**[xi]**) account of punishment in his book Doing Justice (Von Hirsch, 1976). At the time, however, he saw one pitfall in the approach. Imposing a deprivation on the offender in order to redistribute the benefits and burdens does not explain why an offender deserves to be punished "instead of being made to suffer another kind of deprivation that connotes no special moral stigma" (Von Hirsch, 1976, p. 48). Von Hirsch escaped the pitfall by contending that because the offender has done wrong, he deserves

blame for his conduct. While depriving the offender of his unfairly gained advantage, the implicit element of reprobation in punishment expresses the blame that is deserved.**[xii]** A sophisticated version of this account of punishment was given earlier by the Dutch philosopher of law, Leo Polak. Polak called his account an 'objectified theory of retribution' (Polak, 1947, Ch. VIII). Central to Polak's approach is the contrast between the 'objectively valid morality' and the 'subjectively valid immorality' manifested by crime.

Punishment is required and considered to be just in order to equalise this contrast. To equalise the contrast, two points of reference are necessary. The first point of reference is the unfairly gained advantage by the offender: no thief should be able to enjoy that which he has stolen (Polak, 1947, p. 320). The second point of reference is the blameworthiness of the offender's immoral (anti-social) character, which also merits punishment. By only taking away the unfairly gained advantage (reference point #1) an offender is merely returned to the subjective place he held before the crime, his *status quo ante* (Polak, 1947, p. 321). By also punishing his 'subjective immorality' (reference point #2), not only has the unfairly gained advantage been taken away, but the objectively valid morality has also been reaffirmed: the immoral will of the offender may not be held valid (cf. Hegel). Combining these two points of reference results in retribution being described as 'objectifying harmonisation'. Although the benefits-and-burdens approach is a true positive retributive approach, it suffers some major practical problems. How should unfairly gained benefits be measured for different types of crime? Can the gravity of crimes be assessed in a fair way using this principle? Are the benefits and burdens equally distributed in society to begin with? Is there an objectively valid morality shared by everyone?**[xiii]**

This discussion of positive retributivism will be concluded with a brief discussion of Robert Nozick's approach. Nozick literally goes beyond the benefits-and-burdens approach in his retributive account of punishment. Before the infliction of a deserved penalty on an offender, his unfairly gained advantage should be removed or counterbalanced (Nozick, 1981, pp. 363–364). The redistribution of benefits and burdens is therefore not an integrated part of Nozick's conception of punishment. Instead, for the justification of punishment, he assumes a strictly normative outlook: a value-based approach. Retributive punishment is the communication of a moral message. This message is to be communicated through punishment (i.e., infliction of suffering) in order to make sure that it has a

substantial effect (in some way) on the wrongdoer's life. The objective of the message that is conveyed by the act of punishment is not the moral improvement of the offender (this would be teleological). Rather, such consequences should be seen as "an especially desirable and valuable bonus, not as part of a necessary condition for justly imposed punishment" (Nozick, 1981, p. 374). The objective merely is to connect the offender to the correct values. There is an intrinsic moral value in giving correct values some effect in the life of a person who has become disconnected, even though the person himself will never accept these correct values (Nozick, 1981, p. 377).

According to Nozick, the moral message that is delivered by punishment must be delivered in a way that matches the magnitude of the wrong or harm done. This might be interpreted as a talionic requirement. However, Nozick (explicitly) distinguishes himself from positive retributivist hardliners in that he outlines circumstances in which punishment can be refrained from, even though harm was done and the offender can be held responsible. There is no requirement for punishment in the case of an offender who, before he was captured, sincerely repents his wrongful act, has made amends to the victim(s) and lives his life doing extraordinarily good deeds. The correct values now apparently have a significant effect in his life; the person is already connected to the correct values (Nozick, 1981, pp. 384–385). Unlike Hegel, and in a certain way also unlike Polak, Nozick thus abandons the 'objective' component in punishment under certain circumstances. For Nozick, the celebration of objectified moral values is not a sufficient justification. A necessary condition for justified punishment is individual disconnectedness at the time of the act of punishment itself.

2.5 *Utilitarianism*

Utilitarians have a somewhat easier position to defend than that of retributivists who take an essentially moral stance in order to justify the practice of punishment. True positive retributivists aim to show the moral necessity of punishment while trying to avoid doing this in terms of utility. Utilitarians, on the other hand, 'simply' need to point out the supposed future benefits of an action in order to justify it. The future good (i.e., the utility) in the utilitarian approach to legal punishment is served by the reduction and prevention of crime: the general justifying aim of the practice. The methods available through punishment to achieve such future benefits are:

Individual and general deterrence:

When people refrain from certain actions because of their belief in possible negative consequences, we say they are deterred from those actions (Walker, 1991, p. 13). A convicted offender might be deterred from reoffending (i.e., individual or special deterrence) because, through the experience of punishment, he has suffered the unpleasant consequences of his wrongdoing. Other citizens who might be tempted to commit a crime might desist from doing so (i.e., general deterrence) from fear of the penalties which they see inflicted on convicted offenders (Ashworth, 1992a). Deterrence is based on the assumption that individuals are rational, calculating beings (see Section 2.5.1 below). Besides inducing fear of offending in the minds of the public, general deterrent sanctions are also believed to function as (re-)affirmation of norms.

Rehabilitation:
Rehabilitation, resocialisation, treatment and correction are often used interchangeably in penological literature. They refer to improving or reinstating the offender's position in society and/or changing the offender's personality in order to make him less prone to criminal behaviour. This is typically attempted through techniques such as counselling, psychological assistance, training of social skills and job training (Von Hirsch, 1992b). Traditionally, the 'rehabilitative ideal' is associated with the probation service and alternative sanctions. The contemporary conception of rehabilitation finds its origins in the 'positive school of criminology' which held the (deterministic) view that individuals "do not act from their own free will but are impelled to act by forces beyond their control" (Cavadino & Dignan, 1997a, p. 48). This new direction thus breaks away from the reasoning of Beccaria and Bentham for whom crime was the result of free will and hedonism of individual offenders (Lilly, Cullen, & Ball, 1995, p. 18). It is the science of the etiology of crime which seeks to identify these forces that are beyond the individual's control. These forces can include genetic, environmental, social and psychological forces (Van Dijk, Toornvliet, & Sagel-Grande, 1995, pp. 14–15).

Incapacitation:
Incapacitation is the use of physical restraint (or ultimately death) in order to prevent an offender from reoffending. Although its effectiveness is not disputed, it can only be effective for the duration of the restraint. The choice of whom to incapacitate, and for what period of time, has to depend on predictions of dangerousness: How likely is it that a particular offender will reoffend (and how

serious would that offence be)? Usually the offender's prior criminal record is viewed as the best predictor of his future behaviour. However, if the behavioural prediction is not borne out (e.g., a person who has been predicted to reoffend does not do so), it would imply unnecessarily incapacitating a person and therefore inflict needless suffering on him. The general problem with the strategy of incapacitation is that behavioural predictions about offenders have proven to be unreliable (Gottfredson & Gottfredson, 1994).

Utilitarian accounts of punishment share the general justification of promoting the public good (i.e., prevention and reduction of crime). They differ amongst each other in their focus on the available method(s) to attain that common goal. The terms general and individual (special) deterrence are not to be taken as synonyms of general and individual (special) prevention. The former are means to achieve the latter. General deterrence is a means to achieve general prevention, as individual deterrence is a means to achieve individual prevention. Another means to achieve general prevention is the supposed educational effect of punishment on the general public in the sense that it functions as a (re-)affirmation of norms. Contrary to retribu have an inherent moral denunciatory value, in the instrumental view it is supposed to have utility in the sense of general prevention. Next to individual deterrence, individual prevention is thought to be served by rehabilitation and incapacitation. It may be clear that individual and general prevention can put conflicting demands on the mode and severity of punishment. While an individual offender might best be prevented from reoffending by treatment of his 'deficient personality' (i.e., individual prevention), a deterrent strategy aimed at general prevention would ask for a more severe and exemplary form of punishment, despite the offender's 'needs'. There is a similar conflict between treatment (i.e., resocialisation) and incapacitation: prisons are generally considered not to be the most suitable environments for resocialisation.

Utilitarianism, like retributivism, faces some theoretical and practical controversies. The most prominent of these controversies focus on the following questions: What is left of the utilitarian justification of punishment if the intended future benefits do not appear to be achieved? Do we accept disproportionally severe punishment or even punishment of the innocent if its net effect is to contribute to the maximisation of good in society? The first question has led to often heated debates on the effectiveness of penal sanctions in terms of their

rehabilitative potential. This took the form of the oft referred to 'What works?'-debate (e.g. Mair, 1991; Martinson, 1974; Palmer, 1975; Palmer, 1983; Van der Werff, 1979). Scepticism about the deterrent effects of penal sanctions also emerged (e.g. Beyleveld, 1980; Blumstein, Cohen, & Nagin, 1978). As a result of discouraging research findings in the seventies, renewed attention for retribution emerged, with an ensuing emphasis on the 'just deserts'- model (Von Hirsch, 1976). Concerning the problem of disproportionally severe punishment and punishment of the innocent, many (modern) utilitarians have embraced the negative (i.e., limiting) principle of retributivism on humanitarian grounds, while sticking to a utilitarian general justifying aim of the practice.

The following section offers a brief discussion of two influential early utilitarians who based their theories on deterrence: Bentham and Beccaria. Subsequently the potential conflict in the utilitarian approach between individual and general preventive strategies will be highlighted by a short discussion of the writings of the Dutch publicist, Nicolaas Muller.

2.5.1 *Bentham and Beccaria*

Probably the most influential exponent of utilitarianism was Jeremy Bentham (1748–1832). In *An Introduction to the Principles of Morals and Legislation* (1789), Bentham offers an account of legal punishment based on the principle of utility; it qualifies as a deterrence-based account. In the first chapter Bentham defines the principle of utility:

By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness (Bentham, 1789/1982, ch. I, sct. 2).

According to Bentham, all human beings are governed by the principle of utility. The principle of utility is so fundamental to all actions that it is not susceptible to direct proof, "for that which is used to prove every thing else, cannot itself be proved" (Bentham, 1789/1982, ch. I, sct. 11). For every action, a man weighs the expected pleasures against the expected pains. If the expected pains are greater than the expected pleasures, the action will be desisted. The principle of utility not only applies to the actions of individuals, but also to the actions of the government. The aim of government is to promote the greatest happiness for the greatest number in society. An action of government conforms to the principle of

utility when its net effect is to augment the happiness of the community (Bentham, 1789/1982, ch. I, sct. 7). One of the tools available to the government for promoting this greater happiness is that of legal punishment. Crime produces pains and reduces pleasures in society. Legal punishment, through its supposed exemplary effects, deters crime because it is shown that the benefits of a particular criminal action are outweighed by the pains induced by punishment. However, punishment is itself an evil because it involves the infliction of pain. It can therefore only be justified "as far as it promises to exclude some greater evil" (Bentham, 1789/1982, ch. XIII, sct. 2), that is, to prevent future crimes. In order to effectively prevent offences, an important rule for the level of punishment is: *The value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offence* (Bentham, 1789/1982, ch. XIV, sct. 8).

There is an interesting resemblance with the benefits-and-burdens approach in the retributivist account of punishment. It is important to note, however, that Bentham's objective, in counterbalancing unfairly gained advantages, is *instrumental* in nature, whereas the retributive view is a moral one. Another similarity with some positive retributivist accounts lies in Bentham's preference for punishments that share the quantitative and qualitative characteristics of the crime (Tunick, 1992, p. 73). Bentham expects greater preventive effects from punishments that 'bear an analogy to the offence' because they are more easily learned, better remembered and more exemplary (Bentham, 1789/1982, ch. XV, sct. 7–9). This talionic preference, however, is not seen as a necessary requirement by Bentham. It is only to be preferred when it is practical and not too expensive (Bentham, 1789/1982, ch. XV, sct. 8). Furthermore, the amount of punishment applied should never exceed what is necessary to attain its utility. If it does exceed that limit, it would imply needless suffering which does not conform to the principle of utility. The requirement that the amount of punishment given should not be less than what is sufficient to outweigh the profit of an offence, in conjunction with the limitation that punishment should not exceed what is necessary to attain its utility, constitutes a utilitarian version of the proportionality principle.

When there is *no* utility to be expected from punishment, it is useless and should be refrained from. Bentham defines cases ("cases unmeet for punishment") in which he foresees no utility from punishment (Bentham, 1789/1982, ch. XIII). These cases involve persons who cannot be deterred, for instance, the insane and

the intoxicated. He seems to ignore, however, the general deterrent effect that punishment might have in such cases (Hart, 1968, p. 19–20). Apart from such criticism, it is important to note that contrary to positive retributivist views where justice *requires* punishment regardless of its utility, in Bentham's consequentialist view there is no inherent moral value in the act of punishment itself that would be sufficient to justify it.

An important and difficult issue that any utilitarian has to deal with is punishment of the innocent. If crimes are substantially prevented by punishment of the innocent, the benefits would outweigh the pain inflicted on innocent persons. Clearly then, there could be utility in such punishment which would therefore be justified. This point entails one of the fiercest retributive attacks on the utilitarian account of punishment. Bentham repeats several times, however, that punishment can only be in reaction to an offence; the innocent ought not be punished. Why this is so, can hardly be explained from the principle of utility. Moreover, it resembles the negative retributive principle. Bentham does not elaborate on this point. However, there have been radical utilitarians who indeed explicitly defended exemplary punishment of the innocent (Goldwin, 1976).

Two decades before Bentham's *Principles of Morals and Legislation*, Cesare Beccaria (1738–1794) based his famous treatise *On Crimes and Punishment* (Beccaria, 1764/1995) on a different kind of utilitarian reasoning. Although his work served as an important source of inspiration for Bentham's systematic utilitarianism, Beccaria's account of punishment is a mixture between contractarian reasoning and utilitarianism. Beccaria held that "pleasure and pain are the motive forces of all sentient beings" (Beccaria, 1764/1995, p. 21) and that men are essentially egocentric beings who would sooner benefit from the efforts of others than contribute to the common good themselves: quite an unequivocal early statement of the 'free-rider' problem.

Beccaria adopted the theoretical fiction of a social contract to explain the origin of punishment and the right to punish. Men came together in society (through a social contract of sorts) to end the constant threats to their personal safety and the state of nature ('the state of unsociability') they were living in (cf. Hobbes's Leviathan). According to Beccaria:
(I)t was necessity which compelled men to give up a part of their freedom; and it is therefore certain that none wished to surrender to the public repository more than the smallest possible portion consistent with persuading others to defend

him (Beccaria, 1764/1995, p. 11). (italics added)

The right of the sovereign is comprised of no more than the sum of those smallest possible portions. The sacrifice of the individuals' portions of freedom alone, however, does not suffice to protect against private usurpations and to promote public happiness because every man, in essence, possesses a despotic spirit. In Beccaria's view 'tangible motives' are needed to prevent the egoistic inclinations of every man from resubmerging society into a state of ancient chaos. These tangible motives are punishments against offences. They act "as a counterbalance to the strong impressions of those self-interested passions which are ranged against the universal good" (Beccaria, 1764/1995, p. 9). In order to effectively act as a counterbalance, there must be a proportion between the crimes and the punishments (Beccaria, 1764/1995, p. 19). As Bentham did later, Beccaria views punishment as an ill which should never exceed what is necessary to attain its utility. The purpose of punishment has nothing to do with undoing a crime already committed, nor to give offenders their deserts, but rather to
(…) *prevent the offender from doing fresh harm to his fellows and to deter others from doing likewise. Therefore punishments and the means adopted for inflicting them should, consistent with proportionality, be so selected as to make the most efficacious and lasting impression on the minds of men with the least torment to the body of the condemned* (Beccaria, 1764/1995, p. 31).

Like Bentham's account of punishment, Beccaria's account is centred around deterrence. As was discussed above, Bentham did not give a clear utilitarian reason why we should not punish the innocent in order to deter potential offenders. Beccaria, however, draws on his notion of the social contract as a negative, limiting principle regarding the power of the sovereign. Individuals had given up only the smallest possible portion of their freedom to the sovereign "for promoting the public happiness by giving the greatest possible protection to the vital interests of each and every citizen rather than by pursuing the greatest possible aggregate utility" (editor's introduction to Beccaria, 1995, pp. xx–xxi). Therefore, their contribution to the sovereign could never merit punishment for a crime not committed. Punishment of an innocent person simply does not belong to the right originally invested in the sovereign through the social contract. One of the false ideas of utility, therefore, according to Beccaria is separation of the public good from the good of each individual (Beccaria, 1764/1995, p. 102).

2.5.2 *Individual or general prevention? Muller's utilitarianism pur sang*

Many preventive strategies can be perfectly reconciled. For instance, a general deterrent sanction could well serve as an individual deterrent (and vice versa), incapacitate and have an educative effect on the general public all at the same time. However, the case of rehabilitation, a method of individual prevention, is in potential conflict with general preventive strategies. The sentencer who chooses a severe prison sentence in order to deter potential offenders, could do this *at the expense* of the particular offender who might be helped and prevented from reoffending if he were given some form of treatment.

This conflict is inherent in the writings of Nicolaas Muller, a Dutch lawyer and judge**[xiv]** from the first half of the 20th century. Muller's dissertation in 1908 (Muller, 1908) was a typical product of the deterministic 'new direction' in penological thinking at that time with its emphasis not on the offence and guilt, but rather on the person of the offender and his deficiencies (Janse de Jonge, 1991). Like all utilitarians, Muller found the general justifying aim of punishment in its contribution to the common good in society (Janse de Jonge, 1991, p. 46).

Muller's dissertation consists of case-studies of recidivists of property crimes. Through these case-studies, Muller systematically tries to show the causes of criminality in terms of individual inclinations and deficiencies. Muller's main conclusion on the causes of crime is that individual faults (inclinations) like emotional instability, irritability and restlessness appear to be the most criminogenic factors (Muller, 1908, pp. 498–516). Although Muller recognises an (individual) deterrent effect in punishment, in the long run it does not ensure that a convicted criminal will live an honest life after punishment (Muller, 1908, pp. 523–524). One of the most important means to combat (the repetition of) crime therefore, Muller suggests, is an *individual patronage*. The patron's job is to guide and educate his 'pupil' into an honest life and guard against outbursts of his pupil's faulty inclinations. This patronage should span a substantial period of time (Muller does not provide any further guidance as to the amount of time requested) because offenders' deficiencies in personality are longlived (Muller, 1908, pp. 524–528). What Muller suggests in his dissertation is intensive and continuous rehabilitation of convicted criminals quite similar to (but perhaps more extreme than) what is known in the United States as 'Intensive Probation Supervision' (see, Byrne, 1990; Lurigio & Petersilia, 1992; Petersilia & Turner, 1993; Tonry & Hamilton, 1995, part III, ch. 1).

While Muller's dissertation was primarily focused on individual prevention

through rehabilitation,**[xv]** in the 1930s he developed a liking for the general preventive functions of punishment.**[xvi]** In his essay of 1934, Muller explicitly argues in favour of the general preventive functions of punishment. In the first pages of the essay, Muller points to the potential conflict between individual and general prevention. While general and individual deterrence are perfectly reconcilable, general deterrence and special prevention through rehabilitation can, in specific cases, be in conflict. If general prevention is aimed at, this might well be at the expense of the individual offender in need of rehabilitation (Muller, 1934, p. 16, p. 37).

Muller's argument for the general preventive functions of punishment is twofold. At the time there appeared to be a certain disappointment with the potential of the rehabilitative ideal: it was less effective than had been hoped for (not in the least part because of its defective implementation in penal policy). But more importantly, Muller found the massive (epidemiological) occurrence of certain types of crime indicative of an increasing social disorder calling for penal strategies other than strict individual prevention (Janse de Jonge, 1991, pp. 44, 54). If the perceived causes of crime are massive (i.e., shared by large groups in society) or if the general norms in society regarding certain crimes seem to be defective, punishment should be designed for its general preventive effect. General prevention is supposed to be achieved through general deterrence and the general educative effect of punishment (affirmation of norms). Muller's observations, however, did not lead him to completely abandon the rehabilitative ideal which he had defended twenty-five years earlier: when the cause of a crime is primarily found in the individual's personality, special prevention (i.e., rehabilitation) is preferred. If explanatory individual factors such as poverty or deviant inclinations cannot be found, faulty general norms about the particular crime must be suspected, indicating a general preventive mode of punishment (Muller, 1934, p. 42). Muller thus proposes eclecticism concerning the utilitarian functions of punishment with the attribution of the causes of crime as the primary criterion in each case. But what should happen if certain crimes (at a certain time) appear to take on epidemiological proportions, indicating defective general norms while, at the same time, individual causes can also be demonstrated? Muller's solution to this conflict is straightforwardly utilitarian: since in such cases the greatest utility is to be expected from punishment with a general preventive working, general preventive punishment is to be preferred (even at the expense of the individual offender**[xvii]** over punishment with an individual

preventive working (Muller, 1934, p. 49).

While Muller does not permit punishment of the innocent (only those who have done wrong are available for punishment), his ideas on limitations on general preventive punishment are quite sketchy. He leaves it up to others in general, and the sentencing judge in particular, to determine those limits (Janse de Jonge, 1991, p. 49). However, what is clear is that the instrumentalist Muller allowed for the sacrifice of a (guilty) individual to the common good. Willem Pompe (see below) was convinced that Muller would intuitively keep the limits of justice in mind, although such limits are not found in Muller's theory (Pompe, 1934, p. 252). In relation to this particular point, as well as the fact that his theory did not provide any guarantees for equal treatment of offenders (on the contrary!), Muller was subjected to severe criticism.**[xviii]**

2.6 *Mixed theories*

Regarding the justification for punishment and the aims of sentencing, one strategy, although neither truly a mix nor a true theory, is *eclecticism.* For instance, in cases where the sentencing judge has confidence in achieving prevention through deterrence or rehabilitation he chooses a utilitarian mode of reasoning. When there is little confidence in achieving prevention or when the offence is particularly shocking, the sentencer falls back on retributive reasoning (Walker, 1991, pp. 123–126). This is more of a pragmatic, multi-stage rocket approach to sentencing than a theoretically integrated account of punishment.

Mixed theories differ from such eclectic approaches towards punishment. They do not supply any essentially new insights concerning the general justification of punishment or the aims at sentencing. Rather, they draw upon elements both from retributivist and utilitarian approaches to form 'hybrid' accounts of punishment. In such hybrid accounts, through the combination and integration of retributive and utilitarian principles, one type of reasoning is moderated or limited by the other type of reasoning. This makes hybrid accounts of punishment theoretical and practical alternatives for strict retributive or utilitarian reasoning.

The shape of a hybrid account of punishment depends on the theoretical point of departure. Two general shapes are possible:

1. Utility (i.e., the common good) as the general justification for the practice. The negative retributive principle is superimposed to limit punitive action aimed at

prevention: Only the guilty may be punished and only to the extent of their desert. 2. Retribution as the general justification for the practice. Retributive demands on punishment are toned down by utilitarian considerations. Although retribution provides the general justification for the practice, 'justice' no longer *dictates* punishment to be meted out to the extent of the offender's desert. Rather, utilitarian considerations allow for punishing less than would be indicated by desert, and may even allow for refraining from punishment altogether.

The first type of mixed theory has been discussed in Section 2.4.1 in the context of negative retributivism. There are utilitarians who have recognised the necessity of "independent side constraints of justice that forbid the deliberate punishment of the innocent, and perhaps the excessive punishment of the guilty" (Duff, 1996, p. 3). These utilitarians have embraced the negative retributive principle as a limiting principle (see, Hart, 1968; Morris, 1992). The negative principle provides protection to individuals against disproportionate and unfair use of punishment for the sake of utility. Pure utilitarian reasoning, as was discussed in the previous section, cannot provide such a limiting principle (cf. Bentham). An external principle is needed to guard against the potential excessiveness of utilitarianism. Beccaria also saw the need for a negative principle. However, instead of the negative retributive principle, he makes reference to the social contract as a safeguard against the potential excessiveness of utilitarianism.

The second type of mixed theory takes the opposite view. Retribution, in this hybrid account, constitutes the essence of punishment, its general justification. Below the (upper) limits, defined by retribution, notions of utility determine the choice concerning mode and severity of punishment. Although retribution constitutes the justification for punitive action, punishment is not seen as a moral necessity (cf. Kant's categorical imperative). Rather punishment is permitted on grounds of retribution and only (at most) to the extent of the offender's desert. Retribution provides a threshold (lower boundary) in the sense that only the guilty may be punished. It is generally believed that in the Netherlands, this second type of mixed theory comprises the dominant point of view. The spirit of our penal code reflects such a view (see, Hazewinkel-Suringa & Remmelink, 1994; Jörg & Kelk, 1994; Kelk, 1994a; Kelk & Silvis, 1992). In the Dutch penal code, there are no minimum sentencing requirements specified for separate crimes.**[xix]** Furthermore, there are upper boundaries specified for each separate crime

regarding the portion of punishment. Within the limits of the criminal code, Dutch judges thus have large discretionary powers in sentencing.**[xx]** Below the upper boundary specified for a particular crime, utility (i.e., crime prevention) is believed to provide the guiding principles at sentencing. However, the aims of sanctions are not codified as explicit principles in the Dutch penal code (Denkers, 1975, p. 125).

Willem Pompe, one of the founders of the once (roughly from 1945 to 1965) influential Dutch 'School of Utrecht', defended a mixed theory of the second type. Pompe went to great lengths to argue for retribution of guilt as the general justification of punishment. His conception of retribution is based on notions of 'collective' intuition completed with the disturbance of the objective moral order in conjunction with the personal guilt of the offender (Pompe, 1930; Pompe, 1943). Pompe defines the moral order as the desired order of reasonable, free beings structured by moral laws (Pompe, 1943, p. 33). Central to Pompe's approach is his view of man as a responsible moral being in possession of free will. Punishment should appeal to the offender's sense of responsibility and address him in such a way that honours him as a free being, capable of moral understanding (Pompe, 1957).

It is therefore not surprising that Pompe had some fundamental objections to Muller's notion of general prevention. General prevention (as advocated by Muller) degrades an offender as a means of attaining something for others; it erodes the offender's human dignity and treats human beings as objects instead of persons (Pompe, 1934, p. 251). However, the common good does play a significant role in Pompe's approach. Because the goal of the moral laws is the common well-being, the aims at sentencing should be directed towards that goal. The mode and severity of punishment should be guided by utility. However, since the essence of punishment is retribution, punishment of the innocent is unjust as is punishment that exceeds the measure of guilt. Pompe recognises a problem in positive retributive reasoning in that it would *require* punishment to be meted out to the guilty to the *extent of their desert.* The common well-being is therefore applied in decisions relating to the amount of punishment and indeed whether it should be meted out at all (Pompe, 1930, p. 119; Pompe, 1959, p. 9).

The two types of hybrid accounts discussed here are each other's theoretical mirror image. Interestingly, although the normative foundations (i.e., the general justifications) are completely different, implications for the practice of sentencing

are quite similar. Eventually, in both hybrid accounts, utility rules within the limits of desert. Hybrid accounts may provide useful guidelines for the practice of sentencing. They also seem to circumvent some of the ethical objections made to pure utilitarian or retributive reasoning. However, their practical and theoretical attractiveness tends to hide some potential dangers. If a theory should bind the practice of punishment to a certain order and regularity (see Section 2.2), do hybrid accounts provide acceptable and stable points of reference?

After all, hybrid accounts are pre-eminently suitable for 'criminal politics' (Enschedé, 1990, pp. 14–19). In accordance with temporal and local circumstances or trends, a mixed theory provides ample room for shifting emphasis on functions and goals of punishment *within* the framework of the dominant mixed theory. The pendulum, however, does not swing from one extreme to the other (Kelk, 1994a). Such shifting emphasis will be believed legitimate because this occurs within the hybrid framework.**[xxi]**

However, can we determine whether penal action that occurs within the limits of our criminal code is still in concordance with a hybrid view on the justification and goals of punishment? Perhaps the practice of punishment has deteriorated from one founded on truly hybrid principles into a disguised form of eclecticism. As Duff and Garland noted:
One question about any mixed theory is whether the 'mixture' is a stable one that can be consistently applied, rather than a shifting patchwork of compromises and arbitrary decisions (Duff & Garland, 1994, p. 5).

Another issue concerning a hybrid account of punishment involves incorporating a multitude of potentially conflicting principles. It has already been discussed that individual and general prevention may put conflicting demands on the mode and severity of punishment. Such a conflict is immanent in the utilitarian approach (but may be resolved by the 'highest expected utility criterion'). A mixed theory retains this conflict while adding yet another difficulty. If punishment is essentially retribution of guilt, it would be desirable for punishment to be proportionate to the seriousness of the offence and the culpability of the offender. From the retributive point of view, equality and consistency in sentencing is essential.

However, from an (individual and general) preventive point of view proportionality and equality may render sentencing practices ineffective

(Denkers, 1975, pp. 124–125; Levin, 1972). These utilitarian principles would prefer highly individualised and differentiated sentences dependent on the expected utility regarding a particular offender or group of potential offenders. Both views have their repercussions within the hybrid framework. These conflicting pulls and pushes produce a permanent field of tension within any hybrid account of punishment (cf. Kelk, 1994a, pp. 5–9).

2.7 *Restorative Justice*

The final approach of relevance to the present study is that of restorative justice. In Section 2.3 restorative justice has been called a transitional approach since, in the long run, it aims to replace the traditional penal system (based on retributive and rehabilitative ideas) with the restorative paradigm. In that respect, restorative justice embraces system-competitive and therefore radical views. However, the short-term engagement of those who advocate restorative justice is essentially immanent.**[xxii]**

An important drive behind the development of the restorative justice approach is dissatisfaction with the existing retributive and utilitarian rationales. According to the advocates of restorative justice

(…) *the main objective of judicial intervention against an offence should not be to punish, not even to (re-)educate, but to repair or to compensate for the harm caused by the offence* (Walgrave, 1994, p. 63).

This entails a perspective on (the reaction to) crime quite different from the approaches of retributivism and utilitarianism. Thus within the framework of restorative justice, one no longer speaks of punishment (i.e., intentional and avoidable infliction of suffering). Rather, the term ‘intervention’ is favoured. The intervention, in turn, is justified by the damage done, and is aimed at compensation (reparation) of that damage. The concept of crime is redefined as a *social conflict* involving the victim, the offender and the community. Restorative justice promotes maximum involvement of these three parties (Bazemore & Maloney, 1994). In many of these respects, restorative justice is closely related to Braithwaite’s reintegrative shaming approach to crime and punishment (cf. Braithwaite, 1989; Braithwaite, 1999; Walgrave, 1996).

Christie, defining crime as a conflict, has argued that in the penal system as we know it, the state has taken away this conflict from the parties whose interests are at stake. The victim of a crime now becomes a double loser: after his

victimisation by the offender, the victim is denied the rights to full participation in the process. The state's appropriation of this particular social conflict is a lost opportunity "for involving citizens in tasks that are of immediate importance to them" (Christie, 1977, p. 7; see also Christie, 1981, ch. 11). In restorative justice, the conflict is 'given back' to the parties involved. The role of the state is pushed back to that of a (pro-active) mediator between victim, offender and the community. In this respect, restorative justice functions more like civil law than criminal law. However, the pro-active and coercive roles of the state are maintained in order to initiate and guard restorative processes.

In restorative justice, crime is viewed as injury to the victim and to the community. The conflict must be resolved by restitution of wrongs and losses.**[xxiii]** The offender is held responsible and accountable for his actions and should play an active role vis-à-vis victim and community to repair for the damage done. Although the objective is not to punish, nor to rehabilitate, these may be spin-offs from the restorative intervention. The fact that an offender is coerced into participating in a mediation process, or, alternatively, to perform community services, may entail some retributive element. Furthermore, the restorative process may have beneficial effects on the offender's personality. He is confronted with the consequences of his actions and is expected to contribute to the resolution of the conflict in a positive and constructive way (Walgrave & Geudens, 1996). The central tools in the restorative justice approach for the restitution of wrongs and losses are types of mediation and community service. Originally interventions like mediation and community service were designed as add-on components of sentences, or as alternatives to incarceration in times of prison overcrowding (Jackson, De Keijser, & Michon, 1995; Van Ness, 1990, p. 8). Some reformers however, saw these interventions as opportunities for developing an alternative paradigm of justice: restorative justice. Although damage done is the primary point of reference in restorative justice, the disturbed social order (i.e., disturbed relation between offender and community) is used to complement the justification and to back-up cases where there is no clearly identifiable victim or damage is difficult to define. In those cases the vindication of injustice done to society constitutes the justification for a restorative intervention (Thorvaldson, 1990; Walgrave & Geudens, 1996).

The development of the restorative approach has been simultaneous with the internationally increasing recognition of the rights and needs of victims of crimes

since the 1980's (Ashworth, 1992b, p. 68–69). In 1985, the Council of Europe adopted a recommendation called 'The position of the victim in the framework of criminal law and procedure'. In 1986 the United Nations adopted the 'Declaration of basic principles of justice for victims of crime and abuse of powers'. In the Netherlands, increasing attention for victims of crimes is shown by experiments with (pre-trial) restitution and settlement programs**[xxiv]** as well as by the (so-called) Terwee Act that came into force in 1995. The Terwee Act increases the obligations of prosecution and police to keep victims informed about proceedings and progress in their case. Furthermore, the Act introduced a new type of sanction: the compensation order which entails restitution by the offender to the State. The State, in turn, refunds the sum of money directly to the victim. Finally, the Terwee Act improved the legal possibilities for victims to join a criminal procedure in order to claim restitution (Malsch & Kleijne, 1995). However, although victims of crimes receive more attention nowadays than they did a few decades ago, restorative justice still maintains an uneasy relationship with the existing penal system. Dutch criminal law is non-reparatory in essence and offendercentered (Corstens, 1995, p.2). Some have argued that increasing attention for victims within the criminal law threatens its very essence (e.g. Buruma, 1994). However, that is exactly the objective of those who advocate restorative justice. It is not at all surprising that the intended transition of criminal law into reparative law will have to contend with a fair amount of opposition.

Two related issues are central to the critique of the restorative justice approach: equal treatment of offenders and proportionality between offence and intervention. Restorative justice requires looking at how the particular victim has experienced the offence and considering what the victim regards as being necessary to repair the damage (Davis, 1992, p. 8–9). It should therefore be obvious that taking the (subjective experience of) damage done as the point of reference could result in quite different reparative actions being required from offenders for similar offences. When there is no identifiable victim, as in victimless crimes or when the victim refuses to co-operate, the reparation would take the form of a community service with the 'social harm' caused by the offence as the point of reference. This introduces the problem of quantifying reparation to the community for the public aspect of the offence (Wright, 1991, p. 124). How is this symbolic reparation to the community to be calculated and applied consistently if not on the grounds of desert

(Ashworth, 1992b, p. 69)?

Furthermore, taking damage done as the point of reference and reparation as the goal, may very well lead to interventions that turn out to be even more punitive than those required from the desert point of view. Viewing the punitive effects of the restorative intervention as mere unintentional side effects means losing sight of the proportionality between harm done and culpability on one side and the infliction of suffering on the other side. Focussing on the victim and his damage and the obligation for the offender to repair, implies a certain indifference to the (unintentional) suffering inflicted on the offender. In most cases the restorative intervention would be less punitive than a retributive intervention. However, in some cases, entailing extreme levels of damage, a negative (retributive) principle would seem desirable from a humanitarian point of view. This uneasy relationship between reparation and (retributive) proportionality has indeed led some to embrace negative retributivism as a limiting principle defining the upper limits of the intervention (e.g. Cavadino & Dignan, 1997b). The result of superimposing the retributive negative principle over restorative justice actually creates a new hybrid model.

NOTES

i. In structuring this overview the discussions provided by Walker (1991), Duff and Garland (1994) and Tunick (1992) have been very helpful.

ii. The Restorative Justice paradigm, discussed in Section 2.7, could be argued to advocate a shift from the first to the second and fourth of Kelk's domains.

iii. For a critique on this distinction, see Dolinko (1991). In spite of the critique, I find the distinction useful for analytical purposes.

iv. The terms theory and philosophy of punishment are frequently used interchangeably in the literature. There is, however, a formal difference between the two: penal philosophy is said to be primarily concerned with the general moral justification of punishment, while theories of punishment are more concerned with the formulation of the practical ends of penal action (Duff & Garland, 1994). I do not find this distinction helpful since both kinds of discourse are logically inextricably linked and the important distinction to be made is that between general justification and practical aims of punishment. I therefore prefer the term 'philosophical theory of punishment' as used by Duff and Garland (Duff & Garland, 1994, p. 17). When I use either the term theory, or the term philosophy, I refer to an integrated account of the general justification and the

practical aims of
punishment (i.e., a philosophical theory of punishment).

v. Hart uses the more subtle phrase "disguised forms of Utilitarianism" (Hart, 1968, p. 9). Braithwaite and Pettit make a similar point in saying that "retributivist attempts to provide a rationale for punishment drift into consequentialist doctrines" (Braithwaite & Pettit, 1990, p. 206).

vi. Explaining retributive punishment by referral to our emotions of love and hatred was explicitly proposed by the Dutch philosopher and psychologist, Heymans. See Hazewinkel-Suringa (1994, pp. 896-897), Polak (1947, Ch. VII).

vii. Nozick names five ways to distinguish retribution from revenge (Nozick, 1981, pp. 366-368):

1. Retribution is done for a wrong while revenge may be done for a harm or injury.
2. Retribution sets an internal limit to the amount of punishment whereas revenge need not.
3. Revenge is personal whereas the agent of retribution need not have a personal tie with the victim.
4. Revenge involves the pleasure in the suffering of another, while for as far as retribution involves emotions it is the pleasure in justice being done.
5. The agent of retribution is committed to general principles mandating punishment in certain circumstance, while the agent of revenge seeks vengeance depending on how he feels at the time about the harm or injury.

viii. For an extensive elaboration on intuitionism and its role in our conception of justice, see Rawls (1971, pp. 34–45). See also Nozick (1981, pp. 482–485), on judgement in ethics.

ix. See Polak (1947, Ch. V) for an extensive discussion.

x. In § 214 Hegel comes back to the problem of determining how and how much to punish. He states that "the only interest present is that something be actually done, that the matter be settled and decided somehow, no matter how (within a certain limit)" (Hegel, 1967, p. 137). Hegel leaves it up to the judge's discretion to decide (within the limits of the law) in each particular case.

xi. Partial, because Von Hirsch argued that punishment also serves the consequential end of deterrence.

xii. For an extensive and oft cited discussion on the expressive function of punishment, see Feinberg (1970).

xiii. For discussions on these practical problems related to this approach see Clear (1996), Dolinko (1991), Duff (1996), Von Hirsch (1992a; 1993). Because of

these problems some of the authors who originally endorsed this approach (including Herbert Morris and Andrew Von Hirsch) have later abandoned it.

xiv. For an extensive discussion of Muller's life and work, see Janse de Jonge (1991).

xv. Muller uses the term 'education'. His definition of education (Muller, 1934, p. 19) conforms to rehabilitation as defined in Section 2.5 above.

xvi. Two other Dutch authors, who will not be further discussed, who explicitly endorsed general prevention as a primary function of punishment are Th. W. van Veen (see Van Veen, 1949) and G.E. Langemeijer (see Langemeijer, 1975). They both emphasised the general educative functions of punishment (Berghuis, 1992).

xvii. And even if it would increase the chance of the individual's reoffending (Muller, 1934, pp. 48-49).

xviii. For a full discussion of these criticisms, see Janse de Jonge (1991, pp. 53-61).

xix. For instance, even though an offender has been found guilty of a particular crime, the sentencing judge may decide not to punish at all. He may make such a decision because of the minor seriousness of the offence, the personality of the offender, circumstances at the time of the crime or circumstances that emerged at a later point in time (such as a terminal disease): See art. 9a Dutch Penal Code (DPC).

xx. The wide discretionary powers of Dutch judges are further discussed in Chapter 5.

xxi. For a concise discussion of the shifting emphases in criminal politics in the Netherlands, see Kelk (1994a, pp. 5-21).

xxii. The fact that the short-term engagement of restorative justice is immanent in character has potential dangers for the approach itself. Some have recognised the risk of instrumentalisation of restorative interventions by the conventional penal system (e.g. Messmer & Otto, 1991).

xxiii. Long before the development of the restorative justice paradigm, Hulsman, Dutch professor of law and abolitionist, endorsed conflict resolution as the primary goal of the justice system (see Hulsman et al., 1986).

xxiv. For discussions on the Dutch settlement and mediation programmes, see Malsch & Kleijne (1995).

Punishment And Purpose ~ Penal Attitudes

3.1 *Introduction*

In the previous chapter it has been argued that the practice of legal punishment in itself is morally problematic because it involves actions that would be considered wrong or evil in other contexts. The practice of legal punishment therefore demands a sound (moral) justification. Questions relating to the justification and subsequent goals of punishment have been considered in depth in a number of theoretical and philosophical approaches.

The gamut of theoretical perspectives concerning the justification and goals of punishment has been narrowed down to the general categories of Retributivism, Utilitarianism, Restorative Justice and mixed or hybrid theories. Paying due attention to the main controversies that (still) shape theoretical debate, Chapter 2 elaborated in some detail on the core arguments of these accounts of legal punishment. Radical theories were introduced, but not elaborated, since it was argued that they are of little relevance to the focus of this book, namely the study of attitudes of magistrates within the criminal justice system.

This chapter takes a more detailed look at the concept of *penal attitude* and its measurement. Penal attitudes are defined as attitudes towards the various purposes and functions of punishment. In turn, these purposes and functions of punishment are deduced from the philosophical theories discussed in the previous chapter. Section 3.2 elaborates in some more detail on the 'attitude' concept in general, and 'penal attitudes' in particular. A number of different approaches to the definition and use of the concept of penal attitudes is briefly presented. Section 3.3 explores and justifies the arguments of why it is important to try to measure such attitudes. It is argued that the measurement of penal attitudes is essential for any study that is directly or indirectly concerned with the link between moral theory and practice. Section 3.4 discusses various strategies that

can be used for measuring penal attitudes including some of the practical and methodological issues. Research experiences in the Netherlands and abroad are introduced both for illustrative purposes and to highlight the pros and cons of the different approaches (and should not be viewed as an exhaustive review of such research).

3.2 *What is a penal attitude?*

In the previous section penal attitudes have been broadly defined as attitudes towards the various goals and functions of punishment. Although such a definition introduces the object of the attitudes, the actual meaning of the concept attitude remains unexplained. Before elaborating further on penal attitudes and their measurement, a somewhat more detailed discussion of the attitude concept is therefore merited.

Many texts concerning the study and measurement of attitudes mention Gordon Allport's influential work (1935) as the historical bench mark for the application of the attitude concept in social-psychology. Indeed, Allport was among the first to *systematically* analyse and define the term attitude. However, as his own 'History of the concept of attitude' shows, many scholars before him had attempted to define and use it for scientific purposes (Allport, 1935, pp. 798–810). Allport traces the first use of the attitude concept in psychology back as far as 1862. After reviewing sixteen definitions of 'attitude' and identifying some common and useful elements, he presents his own definition of attitudes:

An attitude is a mental and neural state of readiness, organized through experience, exerting a directive or dynamic influence upon the individual's response to all objects and situations with which it is related (Allport, 1935, p. 810).

Allport's definition contains elements of the concept of attitude that are still generally accepted today.**[i]** However, to some this definition might seem unduly complex (Oskamp, 1977). Moreover, as Fishbein and Ajzen (1975) pointed out, "conceptual definitions will be most useful when they provide an adequate basis for the development of measurement procedures without trying to elaborate on the theoretical meaning of the concept" (Fishbein & Ajzen, 1975, p. 6).

Traditionally, attitudes were said to be partitioned into three components: cognitive, affective, and conative (action tendency). There are, however, questions about the empirical validity of this partitioning because in practice the individual

components may prove to be indistinguishable (McGuire, 1969; Oskamp, 1977). Furthermore, this partitioning has led to much confusion about the true meaning of the concept. It is therefore not surprising that in an extensive literature review, Fishbein and Ajzen (1972) found almost 500 different ways that were designed with the aim of measuring the concept attitude. However, they argue, many of these attempted to place a subject on a bipolar dimension indicating a "general evaluation or feeling of favorableness toward the object in question" (p. 493). Fishbein and Ajzen suggest that the term 'attitude' should be reserved solely to refer to a person's location on the affective dimension concerning a particular attitude object. The evaluative nature of attitudes is reflected by many types of attitude measurement that focus on a person's rating on 'like-dislike', 'agree-disagree', 'favourable-unfavourable', 'good-bad' or 'approve-disapprove' scales. Some of the best known examples of such attitude scales are those developed by Thurstone, Guttman and Likert.**[ii]**
Stressing the evaluative nature of attitudes, a widely accepted definition of the concept is: (…) a learned predisposition to respond in a consistently favorable or unfavorable manner with respect to a given object (Fishbein & Ajzen, 1975, p. 6).

However, as Ajzen pointed out years later (1988), attitudes, though still primarily reserved for the affective dimension, may also be inferred from expressions of beliefs (i.e., cognition) about the attitude object and expressions of behavioural intentions (i.e., conation) toward the attitude object (Ajzen, 1988). In fact, as Hogarth argued, the word 'evaluative' in the definition already implies both a belief (cognition) about an object and an emotional response (affect) to it (Hogarth, 1971). From an operational point of view, this seems to be the most manageable approach to the attitude concept and as such it will be endorsed in this study.

The essence of the definition is that an attitude is learned (through experience, education, social and cultural environment), is evaluative in nature and has a motivational function with respect to behaviour. Furthermore, 'attitude' is a theoretical construct that has to be inferred from measurable responses toward an object (Ajzen, 1988, p. 4). Attitude objects may be things, places, persons, events, concepts or ideas (Oostveen
& Grumbkow, 1988).

In the present context the adjective '*penal*' refers to the attitude object of interest to this book. Thus, in general, we are concerned with the study of attitudes with

respect to punishment. In particular, our interest lies in scrutinising the link between moral legal theories of punishment and the practice of punishment. To further this endeavour, the attitude object(s) have been further restricted to the central concepts of the theories of Retributivism, Utilitarianism and Restorative Justice.

3.3 *Why measure penal attitudes?*

It has been argued, from a moral point of view, that theories can and should bind the practice of punishment to certain order and regularity (see Chapter 2). Moral theory of legal punishment is expected to serve as a critical standard for the practice. In other words, we would expect our practice of punishment to reflect a solid underlying legitimising framework. Officials within the criminal justice system frequently tend to justify their institution and the concrete practice of punishment by referring to legitimizing aims and values drawn from moral theories of punishment (Duff & Garland, 1994). Accordingly, the evident moral worth of philosophies and theories of punishment leads one to expect a consistent link between theory and practice. Closer inspection of sentencing practice, however, suggests that, although a link between (moral) theory and practice may well be present, it is not as evident and straightforward as one might expect or wish. As Tunick has put it:

I believe there is an ideal of justice underlying our practice of legal punishment, an ideal that sometimes gets obscured, lost in the shadows of the institutions of criminal law (Tunick, 1992, p. viii).

At an aggregate level, overlooking longer periods of time, autonomous dynamics seem to underlie the sentencing process. Such dynamics, however, appear to be independent of the offences committed or the social context in which the system is operating (Michon, 1995; Michon, 1997). Furthermore, even though such dynamics may be demonstrated, they do not necessarily reflect underlying *legitimising* views about functions and goals of punishment.

At the more specific level of concrete sanctions in individual cases or in groups of similar cases, the quest for consistent underlying views concerning justification and purpose is perhaps even more complicated. At this level research has repeatedly shown substantial differences between individual judges and between district courts concerning sentencing decisions in similar cases (Berghuis, 1992; Fiselier, 1985; Grapendaal, Groen, & Van der Heide, 1997; Kannegieter, 1994). Furthermore, it proves to be especially difficult to infer underlying purposes or

philosophies of punishment from the actual practice of sentencing (Myers & Talarico, 1987).

This is especially true in instances concerning the relation between offence seriousness and severity of punishment. For instance, with rehabilitation in mind, the more serious the offence, the more deviant the offender's personality is supposed to be, and therefore the longer the offender must be detained in order to rehabilitate. A similar relation between offence seriousness and severity of punishment holds for deterrence, incapacitation, and retribution (Fitzmaurice & Pease, 1986, pp. 49–51; Pease, 1987). Most sentences can be argued *a posteriori* to have had the intention of serving any combination of purposes or any purpose exclusively (cf. Van der Kaaden & Steenhuis, 1976). As such, one might even argue that moral legal theory concerning punishment merely serves as a convenient pool of rationalisations that can be drawn from eclectically (cf. Van der Kaaden, 1977).

Even if all judges would be completely consistent (within and between themselves) in their sentencing practices, it would still be impossible to infer an underlying philosophy solely from the sentences passed. Additional (external) statements concerning purposes of punishment would be helpful.**[iii]** One might expect to find such guiding principles in the Penal Code. In Dutch Penal Code, however, no such information is to be found (Hazewinkel-Suringa & Remmelink, 1994; Nagel, 1977; Van der Kaaden, 1977). Neither a general justification, nor purposes at sentencing are provided in the Dutch Penal Code.**[iv]** But even if 'rationales for sentencing' (Council of Europe, 1993) were to be formalised, the mere existence of such reasoned expositions is not enough to guarantee their adoption by sentencing judges, nor can examination of sentences establish whether they have been applied consistently.

Thus, if we are to study the link between moral legal theory and the practice of punishment, the measurement of judges' penal attitudes is an inevitable prerequisite. We need to be able to measure penal attitudes in a manner consistent with moral legal theory. If there is a legitimising (moral) view or framework underlying the practice of sentencing today, it should somehow be reflected in the minds of the sentencing judges. If a general justification and purposes of punishment were prescribed in Dutch Penal Code, we could 'simply' check if judges' attitudes reflect such prescriptions. In the absence of both formal prescriptions and guiding principles, it is therefore important to measure judges'

attitudes and to search for communal moral points of view with possible implications for sentencing. The first necessary step is to establish that the various theoretical arguments and concepts have some meaning whatsoever in the minds of magistrates. Second, we would have to decide whether judges' understanding of those concepts reflects a consistent, relevant and legitimising perspective of justice for the practice of sentencing.

In summary, moral theories can only 'bind' the practice of punishment if the officials involved in the practice know of, understand, and adopt (at least parts of) those theories. The notion of 'penal attitudes' must be central in any study concerning the link between moral theory and practice. The measurement of penal attitudes will play a critical role not only in establishing the link between moral theory and practice of punishment, but also in assessing implications for legislative change and policy implementation (Bazemore & Feder, 1997). For example, in order to encourage more consistency in sentencing, sentencing committees within the Dutch judiciary are currently coordinating the formulation of 'starting points' in sentencing. Such a system of starting points, however, presupposes the existence of an underlying vision (Lensing, 1998). Detailed knowledge about the visions of Dutch magistrates may determine the success and acceptance of such starting points. It is conceivable that judges interpret and validate goals and means of sentencing in different ways. If we want to harmonise such differences, we need to be able to explicitate them objectively (Van der Kaaden, 1977). Furthermore, longitudinal assessment of penal attitudes, as well as their measurement among different professional groups (e.g., prosecutors, probation officers) may be of crucial importance for shedding light on some of the fundamental dynamics underlying our criminal justice system.

3.4 *Approaches to the measurement of penal attitudes*

This section provides a brief review of a number of approaches to the measurement of penal attitudes. The specific definition of our attitude object (as described in Section 3.2) will be relaxed in order to allow us to draw examples from a wider range of research experiences.

In Section 3.2 it was argued that 'attitude' is a theoretical construct. As such, attitudes are not open to direct observation. Instead, attitudes have to be inferred from peoples' responses to attitude objects. Such responses are believed to be expressions of attitude (De Vries, 1988). These expressions may be verbal or non-verbal in nature and, in general, are measurable. Table 3.1 shows the types of

measurable responses towards objects from which attitudes may

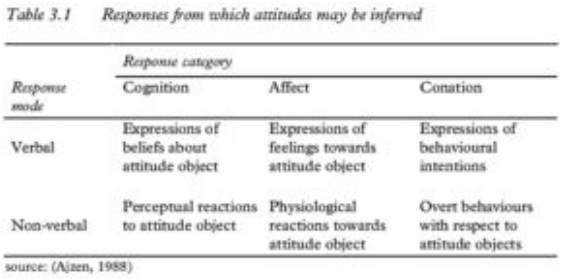

Table 3.1 Responses from which attitudes may be inferred

Response mode	*Response category*		
	Cognition	Affect	Conation
Verbal	Expressions of beliefs about attitude object	Expressions of feelings towards attitude object	Expressions of behavioural intentions
Non-verbal	Perceptual reactions to attitude object	Physiological reactions towards attitude object	Overt behaviours with respect to attitude objects

source: (Ajzen, 1988)

Table 3.1 Responses from which attitudes may be inferred

thus be inferred. The table was extracted from Ajzen (1988, p. 5). Because attitudes have to be inferred from verbal or non-verbal expressions, concerns for reliability and validity of the measurement abound. We will pay due attention to such concerns. Although Table 3.1 shows the various types of responses from which attitudes can be inferred, methods for measuring those responses may vary within and across the cells. A particularly useful and important general distinction between measurement methods is one which considers differences between qualitative and quantitative approaches to attitude measurement.

Qualitative approaches to attitude measurement generally focus in depth on relatively few cases. “It goes beyond how much there is of something to tell us about its essential qualities” (Miles & Huberman, 1984, p. 215). Qualitative research methods include unstructured or semi-structured interviews with open-ended questions (Rubin & Rubin, 1995), think-aloud protocols (Ericsson & Simon, 1984; Newell & Simon, 1972), group interviews and conversation analysis (e.g., focus groups: Morgan (1993)), observations of overt behaviour and content analysis of documents or transcripts. These methods produce data in the form of words rather than numbers (Miles & Huberman, 1984). Although some level of quantification (coding) is not uncommon in qualitative research, in general it does not rely on statistical methods of inference. Rather the qualitative researcher emphasises in-depth interpretation of the often detailed qualitative data at hand (Swanborn, 1987).

Quantitative approaches, on the other hand, focus on relatively large numbers of cases. They are aimed at producing quantitative or easily quantifiable data. Quantitative research methods generally involve the use of (inferential) statistics

in order to search for or test common and generalisable patterns of association or causation. Quantitative approaches to attitude measurement usually concern extensive use of uni- and/or multidimensional scaling techniques with data obtained through questionnaires.

Scaling methods are used to scale persons, stimuli or both persons and stimuli (McIver & Carmines, 1981). One of the most widely used unidimensional scaling methods is Likert scaling (Likert, 1970; McIver & Carmines, 1981; Swanborn, 1988). A Likert scale produces a single score for a person representing his or her degree of favorableness toward a particular object. Some other well-known unidimensional scaling techniques are Guttman scaling and Coombs scaling (cf. McIver & Carmines, 1981; Summers, 1970; Swanborn, 1988). In contrast with the Likert scale, which is subject (i.e., person)-centered, the scales developed by Guttman and Coombs produce scale values (on one continuum) for both persons and stimuli. Of course, the choice of method should depend on the research questions. In contemporary attitudinal research, however, most researchers seem to prefer the use of Likert scales. Likert scaling procedures are relatively simple, easy to use and generally appear to produce results at least as reliable as the other, more complex methods.

Multidimensional scaling techniques involve the simultaneous assessment of respondents' positions vis-à-vis more than one latent trait (i.e., dimensions). Furthermore, ultidimensional methods, such as Principal Components Analysis (Dunteman, 1989), Factor Analysis (Kim & Meuller, 1978; Kim & Mueller, 1978), Multidimensional Scaling (MDS) (Kruskal & Wish, 1978), HOMALS and PRINCALS (Gifi, 1990; Van de Geer, 1988) may be used to determine the dimensionality underlying responses to a set of items. In other words, they are used to determine the number and composition of empirically (and preferably theoretically) discernible latent traits in a particular set of data. As such, in empirical research, multidimensional methods frequently precede unidimensional scaling in order to determine how many and which attitude scales should be constructed as well as which items should be included in those scales.

Before elaborating on some examples of different approaches to attitudinal research in a judicial setting, one more methodological issue regarding certain types of attitude measurement needs to be addressed. As mentioned above, concerns for reliability and validity abound in any type of attitude measurement. Moreover, 'single item measures' of attitude are especially prone to problems of

reliability and validity. Although such single item scales are frequently referred to as 'Likert-type scales', they should not be confused with attitude scales obtained through the Likert procedure, which involves summation of multiple items.**[v]** In single measures of attitude, respondents are asked to report directly on the attitude of interest using a single scale for favorableness or agreement. A single measure can never fully represent a complex theoretical construct. Rather, such a single measure simply captures part of that construct. This is a matter of validity. Furthermore, single measures tend to be unreliable: repeated measurements are not as highly correlated as one might expect or wish.

This is due to random error in measurement. In multiple item scales, the random errors involved in the separate items are assumed to cancel each other out through the combination procedure, yielding a much more reliable final scale. Although most methodologists agree that multiple item scales are superior to single item scales (McIver & Carmines, 1981; Nunnally, 1981), single item scales are still widely used.

Apart from, but related to, methodological issues in scaling, the researcher interested in a particular attitude must decide on how to select or derive the items (attitude statements) that will be used for the measurement. Again, different approaches are possible. Among these are eclectic or pragmatic approaches, theory driven approaches and phenomenological approaches. Below, a number of research experiences with attitude measurement in a judicial setting are discussed to illustrate different approaches.**[vi]**

3.4.1 *Quantitative research*

Multiple measures

One comprehensive and well known quantitative study of the sentencing process is *Sentencing as a Human Process* by Hogarth (1971). Magistrates' attitudes play a central role in this frequently cited study. Given the impact Hogarth's study had in this field of research as well as the systematic and well documented methodology he applied, we will give it more attention than several other studies.

Confronted with substantial disparity in sentencing in Ontario, Canada in the 1960's, Hogarth set out to examine and explain the sentencing process among Canadian magistrates. He distinguished between three main classes of independent variables: variables related to the cases dealt with, legal and social environment (constraints), and personality and backgrounds of the magistrates

(Hogarth, 1971, p. 18). In considering the personality of magistrates, Hogarth chose to focus on 'larger psychological units', i.e., attitudes. He argued that attitudes represent "a compromise between inner forces of individual magistrates and their definitions of the external world to which they relate" (p. 24). As such, he conceived attitudes as information-processing structures (p. 101). Hogarth's definition of the concept attitude is quite conventional and concurs with our view of the concept discussed in Section 3.2 above. His attitude object, however, is much more widely defined. Hogarth considers judicial attitudes. Judicial attitudes include all attitudes relevant to the judicial role which the individual magistrate has adopted.

In determining the method of attitude measurement, Hogarth argued against inferring judicial attitudes from judicial conduct (i.e., overt behaviour) because that would lead to circularity in reasoning when explaining the behaviour. Instead, he chose to construct attitude scales through specifically designed questionnaires. Hogarth's approach to the selection of attitude statements (items) that are used for scale construction is phenomenological.

This approach can be contrasted with the theoretical approach to item selection in which items are logically derived from existing theories on the subject. In the theoretical approach, "the researcher makes a priori theoretical assumptions about the existence of certain attitudes held by the subjects of investigation" (p. 103). In the phenomenological approach, on the other hand, items are selected from evaluative statements made by the subjects of investigation themselves. The phenomenological sources of evaluative statements which Hogarth used include sentencing principles stated by magistrates in reported cases, articles published by magistrates, reports of study groups, decisions of courts of appeal and speeches by judges related to crime and punishment (p. 107). The pool of attitude statements thus obtained was narrowed down in the course of three pilot studies involving various types of subjects such as students, police officers, and probation officers.

For his main study, Hogarth selected a sample of 116 probation officers, 103 police officers, 50 law students, 59 social work students, and 73 magistrates. He used Principal Components Analysis with orthogonal (varimax) rotation of the components to derive attitude scales from a pool of 107 items. Five rotated principal components emerged from the analysis, explaining almost 60 percent of the total variance in responses. The first component is labelled justice. It covers

items that seem related to the concern that crime be punished in proportion to its severity (just deserts).

The second component is labelled *punishment corrects* and involves items related to individual prevention through treatment and individual deterrence. The third component is labelled *intolerance* and involves items not directly related to crime, but, rather, *social deviance* in general. The fourth component is labelled social defence and involves items related to general deterrence and denunciation of crime. The fifth and final component is labelled *modernism* and relates to 'new-world' puritanism versus values associated with the modern welfare state. It involves items concerning the use of alcohol, crime, need for self-discipline and antagonism to social welfare measures (p. 129).

Although Likert scales analogous (in terms of items) to the five components turn out to be quite reliable (split half reliability), the rotated principal components had better predictive value regarding the Canadian judges' sentencing behaviour. This finding was obtained through regression analyses. Before drawing any definite conclusions about the impact of judicial attitudes on judges' sentencing behaviour, Hogarth's analyses proceeded with including variables related to the cases dealt with, and legal, social and situational constraints. Results showed sentencing by Canadian magistrates
(…) *as a dynamic process in which the facts of the cases, the constraints arising out of the law and the social system and other features of the external world are interpreted, assimilated, and made sense of in ways compatible with the attitudes of the magistrate concerned* (Hogarth, 1971, p. 343).

These findings concur with Hogarth's view of attitudes as important information-processing structures. Although the judicial attitudes themselves may not be the most important single factor determining the outcome of a sentencing process, they play an important role in the way judges perceive (filter) the world around them (p. 367).

Hogarth was among the first to systematically analyse the sentencing process in a quantitative manner using a wide range of independent variables including judges' attitudes. Although criticisms regarding some of the methods are possible[vii], the study had considerable impact and served as an important impetus for future research.

Examples of more recent studies in which similar quantitative approaches to the measurement of (penal) attitudes were used, include those carried out by Carroll et al. (1987) and by Ortet-Fabregat and Pérez (1992). Carroll et al. set out to find coherent patterns of association ('resonances') among sentencing goals ('penal philosophies'), causal attributions, ideology and personality. They described two studies: one with law and criminology students and one with probation officers, both in Chicago, U.S. They factor-analysed a pool of 104 sentencing goal items.**[viii]** Three meaningful factors emerged from the analysis:
satisfactory performance of the criminal justice system, punishment (harsh treatment) and rehabilitation.

Subsequently, for further analyses, the highest loading items were selected for inclusion in summated rating scales (i.e., Likert scales).

The same procedure was applied to construct scales for attributions of crime causation, ideology and personality. For both students and probation officers, further analyses indicated two types of coherent patterns among the variables. The first revealed a conservative and moralistic pattern: a punitive stance toward crime; belief in individual causes of crime; lower moral development of offenders; authoritarianism; dogmatism; and political conservatism. Carroll et al. viewed the second pattern as being more liberal in nature: rehabilitation; deterministic view on causes of crime; higher moral development of offenders; and belief in the powers and responsibilities of government to correct social problems (Carroll et al., 1987).

Ortet-Fabregat and Pérez (1992) discussed two studies aimed at describing and comparing attitudes of different types of professionals within the criminal justice system in Catalonia, Spain toward causes, prevention and treatment of crime. The first study used a sample of students, while the second study used rehabilitation teams and social workers from prisons, prosecutors, judges and lawyers, corrections officers and police officers. The main purpose of the first study was to develop scales measuring the attitudes towards causes of crime (cf. Carroll et al., 1987), prevention, and treatment. The authors' approach to the selection of items was eclectic, theoretical and phenomenological. They eclectically obtained items from existing attitude scales (e.g., Brodsky & Smitterman, 1983), theoretically from scientific literature about the topics and phenomenologically from communication with professionals in the criminal justice system. Causes of crime were represented by 22 items, prevention by 25, and treatment by 22. Each set of

items was separately analysed using Principal Components Analysis with orthogonal rotation. Two principal components appeared to underlie attitudes toward causes of crime: *hereditary and individual* causes, and *social* and *environmental* causes. Analysis of the prevention items also resulted in two components: *coercive* prevention and *social intervention prevention*. Analysis of the treatment items resulted in one substantive underlying component, which was labelled *assistance versus punishment*. Analogous summated rating scales (i.e., Likert scales) were constructed for subsequent use in the second study with criminal justice professionals. The second study aimed at describing and comparing mean scores on the attitude scales between the various professional groups in the sample. Results indicated that, overall, a social and rehabilitation approach to the causes, treatment and prevention of crime was favoured (Ortet-Fabregat & Pérez, 1992). Apart from this overall impression, any differences found were in the directions that could be expected considering the different professional roles of the groups. For instance, rehabilitation teams and social workers from prisons were less favourable towards coercive prevention and more favourable towards social intervention prevention than were law enforcement officers.

Single measures

Single measures generally focus on concrete sentencing goals, such as rehabilitation, retribution and deterrence. Respondents are either asked to indicate their favourableness toward the concepts on separate rating scales or requested to rank a number of sentencing goals. Some of the studies concern ratings for sentencing goals in general whilst others relate to specific cases. Examples of studies in which such measurement procedures are used include those carried out by Forst and Wellford (1981), Henham (1990), and Bond (1981).

To provide an empirical foundation for the formulation of sentencing guidelines for the federal court system in the U.S., Forst and Wellford carried out an extensive survey on the goals of sentencing and perceptions of sentencing disparity. They conducted interviews with 264 federal judges, 103 federal prosecutors, 110 defence attorneys, 113 probation officers, 1248 members of the general public, and 550 incarcerated federal offenders (Forst & Wellford, 1981). Respondents were asked to rate the importance that they in general attached to general deterrence, special deterrence, incapacitation, rehabilitation, and just deserts on five-point scales. In order to improve validity of the measurement, all

respondents were first provided with definitions of these concepts. Judges were also asked about the severity of their sentences when, for a given case, they had a specific sentencing goal in mind. Furthermore, the general ratings for the sentencing goals were used to explain judges' sentencing decisions in 16 hypothetical cases. Results indicated that among judges general and special deterrence were found to be especially important, followed, in decreasing order of importance, by incapacitation, rehabilitation and just deserts. Prosecutors and probation officers also found deterrence and incapacitation more important than rehabilitation and just deserts. Among defence attorneys and prison inmates, rehabilitation received strongest support. Judges indicated that rehabilitation, if intended, clearly makes a sentence more lenient. Using the hypothetical cases, with length of the prison term as dependent variable, regression analyses showed that judges' perceptions of the goals of sentencing could explain 40 percent of the variance.

Henham (1988; 1990) examined English magistrates' sentencing 'principles' as well as their sentencing behaviour. Henham interviewed 129 magistrates using structured questionnaires. He asked the magistrates to rate the general sentencing objectives of reformation, punishment, general deterrence, individual deterrence and protection of society on five-point scales.**[ix]** Furthermore the magistrates were asked to select a particular sentencing objective for each of five hypothetical criminal cases. Results showed that, in general, English magistrates attached greatest importance to protection of society, followed by, in decreasing order of importance, individual deterrence, general deterrence, punishment and reformation. Correlations between these ratings led Henham to speculate that magistrates find it difficult to discriminate amongst the various objectives (p. 115). However, this may well be due to error resulting from Henham's measurement method (i.e., single measures). Furthermore, magistrates appeared to be consistent in terms of the general and case specific views that they hold themselves. However, contrary to Hogarth's findings, Henham found no evidence to "support the view that penal philosophy is a particularly important mechanism in the selective perception of information regarding legal constraints by sentencers" (Henham, 1990, p. 151).

Bond and Lemon (1981) carried out a study among 157 English magistrates to determine the effect of experience and training on importance attached to sentencing objectives and sentencing behaviour. Respondents were asked to give

a general rating of importance for individual deterrence, general deterrence, reformation, retribution, and protection of society. Subsequently for eight hypothetical cases, judges were requested to indicate the appropriate sentence. Results indicated that as a result of experience, magistrates became less inclined to perceive their role in sentencing as one concerned with reformation of offenders and more inclined to see it as concerned with deterrence and protection of society. Furthermore, increasing experience leads to less sympathetic views of offenders (p. 133). Training, which magistrates receive on the bench, appeared to moderate these effects.

Apart from measuring favourableness toward certain sentencing goals with rating scales, several other methods have sometimes been used. Some researchers asked respondents to mention the goal(s) they aim to achieve with a sentence either in a general sense, or in the context of a specific case. An example of such an approach is Kapardis' research.**[x]** Kapardis (1987) used nine cases with 168 English magistrates. Judges were asked to pass sentence and indicate which goal(s) they wanted to achieve. The most frequently stated aim among magistrates was individual deterrence, followed by punishment, reform, protection of society, general deterrence, denunciation and reparation. However, widely different sentences were sometimes given in the same case and with the same penal aim in mind.

Kapardis found no consistency between judges' penal philosophies (in terms of sentencing objectives) and punitiveness in sentencing behaviour (p. 198). A second example of a study concerning judges in criminal courts using other methods than rating scales, is the study carried out by Bruinsma and Van Grinsven (1990). Although this study was not directly focused on measuring individual penal attitudes it is an exception to the general lack of quantitative studies in the Netherlands in this area of research. Bruinsma and Van Grinsven chose abstract sentencing goals as the starting point of their analyses. Propositions were deduced from these sentencing goals. For instance, concerning the sentencing goal of general prevention, the deduced proposition was: 'The more serious the offence, the harsher the punishment' (Bruinsma & Grinsven, 1990, p. 136). In order to empirically test these propositions, Bruinsma and Van Grinsven transformed them into decision rules, incorporating case- and offender characteristics. Assuming that the amount of material damage is a good indicator for seriousness, the resulting decision rule for the above proposition was: 'The

greater the material damage caused by the offence, the harsher the punishment' (p. 136). The researchers realised that if they found empirical confirmation for the decision rules, it would not necessarily imply that the 'underlying' sentencing goals had indeed been aimed for.

This is due to unavoidable difficulties involved in inferring underlying purposes from the actual practice of sentencing discussed in Section 3.3. Instead, they argued that failure to empirically confirm a decision rule does merit the conclusion that the underlying sentencing goal had not been applied. In the above manner, propositions and decision rules were deduced from a number of sentencing goals. Bruinsma and Van Grinsven tested their decision rules using a random sample of 1210 cases heard by police judges at district courts in the Netherlands. Results indicated that Dutch police judges are only to a limited extent guided by the decision rules that were deduced from sentencing goals.

3.4.2 *Qualitative research*

In this section we will discuss examples of qualitative research carried out in the Netherlands. The reason for this decision is that research on attitudes among Dutch criminal justice officials in general, and judges in particular, is very scarce (Frijda, 1996; Van Duyne & Verwoerd, 1985; Van Koppen, Hessing, & Crombag, 1997). In so far as Dutch research directly or indirectly involved (penal) attitudes, views or opinions, it has been predominantly qualitative in nature. The methods used involve interviews, dossier and protocol analysis, discussion groups, and participant observation. As such, this section not only illustrates relevant methods of qualitative research, but also outlines the general state of affairs of such research in the Netherlands. The studies discussed include those carried out by Enschedé et al. (1975), Van der Kaaden and Steenhuis (1976), Van Duyne (1983; 1987), Van Duyne and Verwoerd (1985), Kannegieter and Strikwerda (1988), and Kannegieter (1994).

From 1952 until the end of 1954, Enschedé kept systematic notes of the cases he heard as a police judge**[xi]** in the District Court of Rotterdam. His notes on 244 cases of theft in the Rotterdam harbour area were later analysed by Moor-Smeets (Enschedé et al., 1975, pp. 25–58). Because Enschedé found it difficult to motivate his sentences in more than superficial terms and frequently lacked the time to register his motivation, analysis of the reasons for the sentences was seriously impaired. However, perusal of the sentences passed in relation to characteristics of the offences, together with a general disregard for

characteristics of offenders, led Moor-Smeets to speculate that Enschedé's point of view was more likely to be general preventive in nature than special preventive (p. 41).

Following the analyses by Moor-Smeets, Swart (Enschedé et al., 1975, pp. 59–93) attempted to concentrate in greater detail on judicial views and opinions on sentencing. He combined two methods of investigation.

First, subjects were asked to pass sentences in nine versions of a hypothetical theft case. Participants were also asked to motivate their judgement.

Second, after passing and motivating the sentences, participants discussed their decisions and views with each other. Eleven such sessions were held in ten different districts in the Netherlands, with a total of 162 participants. Most participants were members of the judiciary (judges and prosecutors). Results indicated substantive variation in sentencing decisions and motivations within each version of the case. Since participants received the same hypothetical cases, Swart points to personality characteristics of participants as the most probable cause of this variation (p. 81).

With reference to Hogarth's research findings, Swart speculates about the selective perception and interpretation of case characteristics by participants as a result of their personal views (p. 62, p. 82). However, incompleteness and superficiality of the written motivations provided by (only half of the) participants offered only fragmentary insight in such factors. In discussing the cases, participants showed clearly differing opinions on sentencing objectives. In each case, a wide variety of objectives was endorsed by different participants. Moreover, participants seemed to lack a common frame of reference for discussing sentencing objectives with each other. Furthermore, participants who had different objectives in mind passed the same sentence, while participants with the same objectives in mind passed different sentences (p. 83). The general impression emerging from these analyses was not one that conforms to the idea of sentencing as a rational, goal-orientated practice.

Van der Kaaden and Steenhuis examined prosecutors' views and behaviour in the Arnhem jurisdiction**[xii]**, the Netherlands (Van der Kaaden & Steenhuis, 1976). The first stage in their research involved a questionnaire in which participants were asked to determine and motivate a sentence in two (real) robbery cases.

Subsequently, after inventarisation of responses, discussion groups were organised with the prosecutors in each district in the region. In the discussion groups, participants were asked to explain their sentencing decisions and motivations. The prosecutors were encouraged to comment on each other's responses. Results showed large variations in sentencing demands in both cases. For instance, in one of the cases, decisions varied from dismissal up to 12 months unconditional imprisonment with a compulsory hospital order. These differences could not be attributed to different views on sentencing objectives. As in Swart's analysis, participants who had the same objectives in mind passed different sentences while participants who had different objectives in mind passed the same sentence. Because the meaning of the various sentencing objectives was obviously interpreted very differently by different prosecutors, a second round of discussions was organised. This time, the meanings of the objectives retribution, special and general prevention, affirmation of norms, and conflict resolution were extensively discussed. Confusion about the meaning of these concepts abounds. Like Swart, Van der Kaaden and Steenhuis conclude that sentencing does not appear to be a very rational practice. Rather, in essence, sentencing appears to be a highly personal matter (p. 19–20).

Van Duyne carried out two observation studies, one with prosecutors (1983; 1987), the other with judges in the plural chamber of a district court (1987; 1985). In order to gain more insight into the decision making processes of prosecutors, Van Duyne focussed on seven prosecutors at the District Court Alkmaar, the Netherlands. He asked them to think aloud while handling ten real cases. Van Duyne found the decision making processes of the prosecutors to be less complicated than expected. The decision making appeared to be one-dimensional: prosecutors selected only those characteristics of a case for consideration which were consistent with a particular 'dimension'. Examples of such dimensions are 'professionalism', 'social misfit' or 'rehabilitation' (Van Duyne, 1987, p. 147).

Despite this 'simple decision making', large discrepancies were found in sentencing demands in each case. Reasons for these discrepancies, Van Duyne argued, include the fact that prosecutors may differ substantially in their choices of the dimensions, in the weights attached to the selected characteristics of a case and in their opinions about proper punishment (Van Duyne, 1987, p. 147). Furthermore, unless specifically requested, very few prosecutors mentioned

sentencing objectives. When asked specifically, retribution and prevention were the most frequently mentioned sentencing objectives. According to Van Duyne the fact that most prosecutors did not initially mention sentencing objectives should not be taken to imply that such objectives are irrelevant: purposeful action does not necessarily require decision making with prominent and clearly formulated objectives in mind (Van Duyne, 1983, p. 189). Sentencing objectives, Van Duyne concluded, do play an important role, but this is at a more implicit level and only among a wide range of individual variables related to perceptions of the working environment and task conception.

Through participant observation,**[xiii]** Van Duyne and Verwoerd (Van Duyne, 1987; 1985; Verwoerd, 1986) examined the collective decision making processes in a panel of judges sitting at one of the district courts in the Netherlands. They attended deliberations in chambers and later analysed 27 transcripts. Punishment objectives such as rehabilitation, retribution or deterrence were seldom mentioned explicitly in the deliberations. Moreover, the decision making seemed very casual to the extent that one of the researchers compared it to haggling in the marketplace (Van Duyne, 1987). No indication was found between sentencing objectives perceived by judges and their actual sentencing behaviour (Verwoerd, 1986). However, the absence of overt verbal statements and discussions pertaining to sentencing objectives does not necessarily imply such considerations to be unimportant for the individual judges (cf. De Keijser, 1999; Van den Heuvel, 1987).

Kannegieter and Strikwerda (Kannegieter, 1994; 1988) set out to examine disparity in sentencing in minor criminal cases. They focused on public prosecutors' and judges' views on sentencing. In 1987 they interviewed 18 prosecutors and 17 police judges in the district courts of Leeuwarden, Groningen and Assen, the Netherlands. In the first part of the interview, respondents were asked to demand (prosecutors) or pass (judges) a sentence on a written case that they received some time before the interview. Some information pertaining to personal characteristics of the offender was omitted in the case dossier in order to determine the relative importance of such factors. The additional information was only given if a participant asked for it. After participants had made their decision, they were asked to motivate it. Results showed a great deal of variation in decisions on this one case. The type and severity of punishment could not be consistently related to sentencing objectives. Answers to questions about

sentencing objectives were given in very superficial terms. In general, however, there seemed to be agreement that special prevention was the main objective in their sentencing decisions. Despite such agreement on the main general goal, means to attain that goal were viewed very differently (Kannegieter & Strikwerda, 1988, pp. 60–61). Furthermore, almost half of the judges stated their scepticism about the realisation of sentencing objectives.

3.4.3 *Some final remarks*

In summary, a number of widely used quantitative and qualitative approaches to the measurement of attitudes, opinions or views in judicial settings have been discussed. Most of the studies were aimed at explaining sentencing behaviour using psychological (attitudinal) characteristics of the sentencer. The findings of these studies seem to vary as much as the sentencing behaviour that most researchers report. In this chapter, the studies discussed were used mainly as examples of different measurement approaches. However, even if we had carried out an exhaustive literature review, given the wide variety of methodologies and types of respondents, it would have been extremely difficult to draw general conclusions. Perhaps a meta-analysis (cf. Mullen, 1989; Rosenthal, 1984) of such studies would provide some more general insights. Such a meta-analysis would require coding of variables such as research method, type and number of respondents, types of cases used, year of research and country of research. Concerning the Dutch situation, there is one aspect that seems to emerge from all the qualitative research reviewed. This concerns the confusion or disagreement among criminal justice officials about the meanings of various sentencing objectives as well as the researchers' inability to find consistencies between sentencing philosophies and sentencing behaviour.

Despite such findings, most authors still allot an important role to the personal views of sentencers. Frequently this is done in a way similar to Hogarth, by stating that psychological characteristics determine the way in which people perceive and interpret the world around them. Concerning the views of the participants in the different studies, one cannot escape the impression that opinions about goals and functions of punishment are not very relevant or interesting to them. Of course this does not necessarily imply that such attitudes or opinions are absent or do not play a role in a less obvious or indirect manner.

NOTES

i. For a detailed critical discussion of the separate elements in Allport's definition

of attitude, see McGuire (1969).

ii. See Summers (1970) and Fishbein (1967) for these and other scaling techniques.

iii. In 1993, the Council of Europe has strongly recommended its member states to explicitly express 'sentencing rationales' in their Penal Codes in order to reduce inconsistency in sentencing (cf. Council of Europe, 1993). These recommendations reflect a firm believe in the relevance and impact of theoretical and philosophical concepts for the practice of sentencing.

iv. For a critical discussion on the absence of justification and purposes of sentencing in Dutch Penal Code, see Nagel (1977, pp. 30-40). See also Walker (1985, pp. 105-106) who critically argues that many penal statutes' silence on the purposes of punishment is deliberate and has political reasons.

v. The term Likert-type scale is frequently used for the method of scoring, implying (usually) a five-point scale ranging from 'completely agree' to 'completely disagree'. Furthermore, an integral part of the Likert procedure is determining internal consistency of the summated scale through item analysis.

vi. Preparatory work carried out by I. Bakker has been very helpful as the basis for the following sections. See Bakker (1996).

vii. For instance, one might argue that Hogarth's phenomenological approach for deriving attitude scales involves a circular aspect. The scales were derived from evaluative statements of the same population to which they are applied. Furthermore, orthogonal rotation of the principal components yields uncorrelated scales: such orthogonality is artificial and may not do justice to meaningful and important correlation between particular attitudes.

viii. How exactly this pool of items was obtained, remains unclear. The authors mention that the items were selected from a larger pool of items which was written to reflect the dimensions under study (Carroll et al., 1987, p. 110).

ix. Henham used and adapted Hogarth's purposes of sentencing (Henham, 1990).

x. A similar approach was chosen by Ewart and Pennington (1987).

xi. See Section 5.2 for an introduction to the organisation of Dutch criminal courts.

xii. That is, 'Hofressort' Arnhem: see Section 5.2.

xiii. One other example of research with participant observation in a judicial setting is Van de Bunt's research (1985) on decision making by public prosecutors in the Netherlands.

Punishment And Purpose ~ Development Of A Measurement Instrument

4.1 *Introduction*

In Chapter 3, the concept of penal attitude was examined in some detail. Furthermore, the point was made that, while research on psychological characteristics of magistrates is quite common in some other countries (e.g. United States, England, Canada, Germany), in the Netherlands this type of research seems to be a 'blank spot' (Snel, 1969). The few (predominantly qualitative) studies that were carried out have led to rather inconclusive results concerning magistrates' penal attitudes. Furthermore, no systematic quantitative study on this topic has been carried out in the Netherlands thus far. We consider this to be a serious deficiency in criminological and psychological research on the Dutch magistrature.

The present chapter therefore focuses on the systematic process of developing a theoretically informed measurement model of penal attitudes. Section 4.2 discusses the measurement approach that we have adopted. However, our approach, like any other, is accompanied by a number of methodological and practical concerns. Each of these will be given due attention. Section 4.3 elaborates on the process of translating the relevant theoretical concepts into measurable variables (i.e., operationalisation) resulting in an initial version of the measurement instrument. In Section 4.4, the procedure and results of the first application of the instrument with Dutch law students (N=266) are discussed. Implications of this study for subsequent refining or revising the measurement instrument are then considered in Section 4.5. Section 4.6 describes the further steps in the development of the measurement instrument. The procedure and results of a second empirical study with Dutch law students (N=296) are reported. The results of this second study are compared to those of the first study thus allowing a measure of reliability (i.e. replicability) to be obtained. Finally, in

Section 4.7, results of the second study with law students are used as the foundation for a basic (structural) model of penal attitudes. To further validate the measurement instrument, to confirm results of the studies with law students and to explore the structure of penal attitudes, this model will be tested in Chapter 6 using data collected from judges in Dutch criminal courts. The position we adopt is that the development of a theoretically integrated model of penal attitudes contributes to a better understanding of how moral legal theory becomes translated into practice by criminal justice officials.

4.2 *Measurement approach*

We have opted for a quantitative approach to the measurement of penal attitudes. Several considerations guided this choice. The point of departure is a theoretical one. The interest is in determining whether concepts that are central in moral legal theories are measurable and meaningful for Dutch judges. Furthermore, we want to unveil the general structure of penal attitudes held by Dutch judges. These goals imply the use of (inferential) statistics which require quantitative data. We believe that a scaling approach designed to measure penal attitudes using more indirect questions (items) related to the theoretical concepts will yield most valid results. Given previous Dutch experiences with qualitative research involving judges' views (see Section 3.4.2), the efficacy of such an approach for our purposes is questionable. The qualitative studies reviewed in the previous chapter show that Dutch judges (and prosecutors) rarely reveal their penal philosophies spontaneously. Direct questioning concerning magistrates' penal attitudes mostly yielded superficial answers and showed that there was much confusion about the meaning of the relevant concepts. Our approach may shed more light on the personal views of judges than has been achieved with more qualitative approaches.

Research using such a quantitative approach has its own specific requirements related to validity, reliability and sample size. A further concern is related to the specific population of interest to the study. As a result of training and experience, judges tend not to think in terms of general problems in law and sentencing. Unlike the social scientist who aims at generality, judges are used to reasoning within the framework of a specific case. In other words, they are accustomed to interpreting and perceiving problems in the light of *specific cases* (Vranken, 1978). This may have consequences for judges' perception of, and willingness to respond to, general questions in structured questionnaires.

Given our preference for a quantitative scaling approach to the measurement of penal attitudes, two further decisions needed to be made. The first was the choice between using single or multiple measures for measuring the relevant concepts. As discussed in Section 3.4, given reliability and validity problems related to single measures of theoretical concepts, multiple measures appear preferable. This choice seems to be especially relevant given the fact that most qualitative research found a lot of confusion among magistrates about the meanings of concepts related to functions and goals of punishment. A subsequent decision relates to the method for selecting suitable items. The choice between a phenomenological and a theoretical approach to selecting items was quite easy. Because of our explicit theoretical point of departure, a theoretical approach to item selection was the obvious choice. Moreover, the definition of our attitude objects (see Section 3.2) logically implies such a theoretical approach for selecting attitude statements.

4.3 *Selection and formulation of attitude statements*

The theories discussed in Chapter 2 represent our point of departure for the process of selecting and formulating attitude statements. Deriving attitude statements first involved *conceptualisation* of the theories, followed by a phase of *operationalisation*. Within each approach, we identified the central concepts. Given our discussions in Chapter 2, many of these concepts were quite evident from the outset. The process of identifying central concepts was further complemented and facilitated by studying and selecting core-arguments from the relevant theoretical literature. Such core arguments were statements taken from the literature which we believed to reflect the central issue(s) of a particular approach. At this empirical stage of the study we looked at the relevant theories from an operational point of view. This resulted in the decision not to consider some of the sophisticated metaphysical concepts and arguments for the measurement instrument.**[i]**

Conceptualisation was followed by operationalisation into attitude statements. The selected core-arguments from the literature and examples from some existing attitude scales constructed by others (cf. Carroll, Perkowitz, Lurigio, & Weaver, 1987; Hogarth, 1971; Ortet-Fabregat & Pérez, 1992) proved to be helpful tools for operationalising the theoretical concepts.**[ii]** Great care was taken to make sure that each theoretical concept was represented by multiple statements (items). In a later stage, statistical criteria were applied to select the best items from the

initial item pool.

The process of conceptualising Utilitarianism resulted in the prevention of future crime through *deterrence, incapacitation* and *rehabilitation*.**[iii]** For Retributivism the central concepts were (just) *desert, infliction of suffering, temporal perspective on past behaviour*, and *restoring the moral balance in society*. The central concepts in the Restorative Justice approach were *orientation on victim, active role for offenders, crime as a social conflict, reparation and compensation*, and *discontent with the current criminal justice system.*

The expressive function of punishment (censuring and affirmation of norms)**[iv]** was found to play a role in all three approaches in one way or the other. Thus, because the expressive function of punishment is not expected to differentiate between the approaches, it was considered to be unsuitable for subsequent operationalisation.

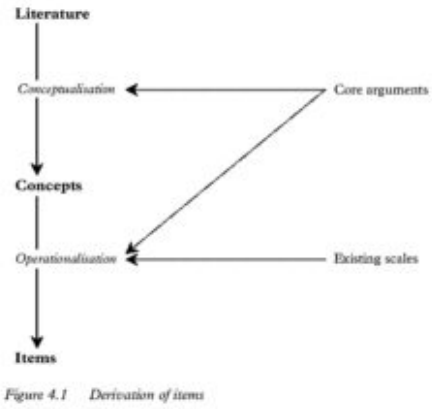

Figure 4.1 Derivation of items

Derivation of items

Some examples of core arguments and final attitude statements for the relevant theoretical approaches best illustrate the process of conceptualisation and operationalisation. Examples of arguments from the utilitarian literature are:
The obligation of judges, correctional officials, and legislators to serve the public implies that they have a moral duty to try to reform offenders (…) (Glaser, 1994, P. 722). (P)unishments and the means adopted for inflicting them should, consistent with proportionality, be so selected as to make the most efficacious and lasting impression on the minds of men (…) (Beccaria, 1764/ 1995, p. 31).

Punishment must not be employed at all if it is inefficacious or unprofitable through creating more misery than it prevents, or if it is needless in the sense

that the mischief of an offence can be checked by non-punitive measures and so at a 'cheaper rate' (Hart, 1982, p. lxi).

The above arguments reflect the concepts of rehabilitation, deterrence, and the guiding principle of utility. These arguments proved helpful in formulating the following attitude statements:
The central focus of the criminal justice system should be on the principle of correction.
The potential for general prevention should determine the severity of punishment. If there is no advantage to be gained from punishment, it should either be waived or be purely symbolic in nature.

Similarly, core-arguments from retributive literature were extracted. Arguments from retributive literature led to identifying, amongst others, the concept of moral balance. A disrupted moral balance can be restored through, for instance, annulling unfairly gained advantages.**[v]** Some resulting attitude statements are:
By means of punishment, an unfair advantage is annulled.
By undergoing punishment, a criminal pays off his debt to society.

The latter statement is an example of one inspired by an existing item used by Hogarth:
Criminals should be punished for their crime in order to require them to repay their debt to society (Hogarth, 1971, p. 130).

Concerning the Restorative Justice approach, examples of core-arguments selected from the literature are:
A new criterion for evaluating the process is introduced: that it should be satisfactory for both parties, not only the victim but also the offender (Wright, 1991, p. 113). Aiming at the resolution of a conflict and the reparation of the loss seems to be more constructive for social life than balancing an abstract juridico-moral order (Walgrave, 1994, p. 68).

Reparation should encourage the reintegration of victims into legal proceedings as individuals with justified claims. Victims should receive active support in obtaining reparation, and this right should have priority over punishment by the state (Messmer & Otto, 1991, p. 2).

These extracts from the Restorative Justice literature reflect some central concepts in this approach. Corresponding attitude statements include:

The victim of a crime should be allotted a central position in criminal proceedings.
The best form of punishment is one which, given the harm caused by the crime, maximises the possibilities for restitution and compensation.
The resolution of conflict is a neglected goal in our criminal justice system.
A criminal process can only be qualified as a success when both offender and victim are satisfied with the outcome.

Following this pattern, operationalisation of the main theoretical concepts resulted in an initial pool of 76 items. Before proceeding to apply the measurement instrument to a sample of law students, this pool of 76 attitude statements was further refined in two ways.

First, two Dutch criminal law students were given a questionnaire containing the 76 items.**[vi]** Each item could be responded to using a five-point scale ranging from 1 'completely disagree' to 5 'completely agree'. After the students had completed the questionnaire, each item was extensively discussed in a subsequent evaluation session. They were encouraged to comment on any aspect of item-wording or content that they found unclear or confusing.

Second, after making the necessary adjustments to a number of items, the revised questionnaire was extensively discussed with a professor of criminal law at Leiden University who also works as a deputy judge.**[vii]** This latter session completed the fine-tuning phase.

4.4 Study I**[viii]**
The aim of this study was to explore and interpret the underlying structure in Dutch law students' responses to the attitude statements. As such, the analyses would give a first indication of the usefulness of the measurement instrument. Is the instrument effective for consistently discerning various underlying concepts or, put in another way, can the instrument effectively measure penal attitudes? If the instrument would fail to discriminate between theoretically meaningful concepts, serious doubts either about the validity of the instrument or about the existence of the attitudes it is supposed to measure would have to be considered.

Furthermore, statistical criteria in conjunction with theoretical concerns have been used to select items from the initial pool of 76 items. In this way, the most adequate items for subsequent studies are singled out. Finally, results of Study I have been used to identify deficiencies in the measurement instrument which also

led to necessary revisions that wouldhave to be made.

4.4.1 *Data collection and sample*

For study I, data were collected from (criminal) law students at the University of Groningen, Erasmus University Rotterdam, University of Nijmegen, and Leiden University. In February 1996, with the help of faculty staff, 374 questionnaires were distributed to students who were attending criminal law lectures. The questionnaire contained the 76 attitude statements in random order. Responses were to be given on five-point scales, ranging from ‘completely disagree’ to ‘completely agree’. Completed questionnaires were returned in pre-paid response envelopes. Students who returned the completed questionnaire received a giftvoucher with a monetary value of 10 Dutch Guilders (about US $ 5).

Table 4.1 Study I (law students): response per university, 1996

University	Distributed N	Received N	Response %
University of Groningen	89	61	69
Erasmus University Rotterdam	50	29	58
University of Nijmegen	155	135	87
Leiden University	80	41	51
	374	266	71

Table 4.1 Study I (law students): response per university, 1996

Within one month, 266 completed questionnaires were returned, yielding an overall response rate of 71 percent. Table 4.1 shows the response rates per university. The Table shows response rates to vary from *relatively* low in Leiden (51%) to exceptionally high in Nijmegen (87%). All questionnaires returned were completed with notably few missing responses. The average age of the law students in the sample is 22.9 years (standard deviation 3.3). More than half (52%) of the respondents were between 18 and 22 years old. The majority of the students in the sample were female (59%), with the Erasmus University Rotterdam showing the highest proportion of females (76%). Most students (64%) were either in their third or fourth year of law study. The remaining 36 percent were all second year law students from Nijmegen.

4.4.2 *Analysis and results*

Principal components analysis (PCA) with orthogonal (varimax) rotation of the axes was first used to explore the underlying structure in the data. **[ix]** Primary criteria for determining the number of principal components to retain were the

'scree' graph (a plot of the latent roots or 'eigenvalues' against components) and interpretability of components. Inspection of the 'scree' graph suggested retaining five principal components.**[x]** Interpretation of these five components was quite straightforward (see below) and related eigenvalues were greater than one. As such the analysis with the 76 items resulted in an initial solution with five principal components. Next, our aim was to select the most adequate items from the initial pool of 76.

Using statistical criteria, we wanted to identify items that contributed little to this solution and could therefore be left out of subsequent analyses. It was decided that items had to exceed a component loading of 0.4 on any of the five components after rotation. Twenty-six items that did not meet this criterion were removed. Further inspection of these 26 items, revealed that they could be considered either too complex or ambiguous in wording. Subsequently, the analysis was repeated with the 50 remaining items. The five principal components (after varimax rotation) resulting from the analysis on these items were essentially the same as in the initial analysis and were readily interpretable. These principal components accounted for 40% of the total variance in responses. Table 4.2 shows the 50 attitude statements and their respective component loadings on five principal components.

Table 4.2 Study I (law students): component loadings after orthogonal rotation (N=266, k=50)

Item	I	II	III	IV	V
In order to deter a larger number of potential offenders, heavier sentences should be imposed in the Netherlands.	.75	.31	−.05	.05	−.08
If heavier sentences were to be meted out, more potential offenders would be deterred than at present.	.79	.29	−.03	.06	−.02
When criminal statistics show the prevalence of a particular offence to be increasing, the severity of punishment for that offence should also increase.	.66	.21	−.05	−.02	.00
Fear of punishment is a useful instrument in crime prevention.	.63	−.04	−.14	.24	−.12
The potential for general prevention should determine the severity of punishment.	.57	.10	−.03	.18	.02
Heavy sentences increase the credibility of the criminal justice system.	.57	.28	−.05	.07	.06
In determining level of severity of a sentence, the opportunities for general prevention should be considered in full.	.56	.23	−.17	.08	.09
The meting out of punishment to perpetrators of offences is a moral duty	.44	.27	−.37	.32	.13
Most people who advocate resocialisation measures for perpetrators of offences attach little importance to the seriousness of the crimes committed.	.42	.32	.21	−.05	−.27
The criminal justice system is an effective instrument for fighting crime.	.42	.26	−.19	.35	−.11
The expansion of alternative sanctions decreases the safety of society.	.38	.30	−.06	−.12	−.29
Infliction of suffering should be an explicit element in every sanction.	.14	.65	−.07	.22	−.03
Even for alternative sanctions the infliction of suffering should be a prominent feature.	.24	.64	−.02	.16	−.19
Punishment should primarily be retribution.	.17	.64	−.10	.23	−.09
Punishment without an element of suffering is no punishment.	.13	.60	−.08	.15	−.13
Punishment is deserved suffering.	.24	.59	−.17	.38	−.09

Table 4.2a Study I (law students): component loadings after orthogonal rotation (N=266, k=50)

The first principal component involves items related to general prevention, mainly through (general) deterrence, and was labelled *Deterrence*. The second component contains items that refer to deserved suffering and 'harsh treatment'. Subsequently, this second component was labelled Desert. All items which have high loadings on the third component relate to the various aspects of the *Restorative Justice* approach. Subsequently, it was labelled Restorative Justice. The fourth component involves items related to restoring a disrupted moral and legal order in society. It involves the general retributive justification for the practice of punishment (cf. Chapter 2). This component was labelled *Moral Balance*. The fifth and final component concerns statements which predominantly focus on personality and deficiencies of offenders and potential for reform or correction. This fifth component was labelled *Rehabilitation*.

Item	I	II	III	IV	V
Only if it becomes more punitive can community service be a full-fledged sanction.	.21	.52	.07	.04	-.10
If there is no advantage to be gained from punishment, it should either be waived or be purely symbolic in nature.*	-.02	.50	-.33	-.16	-.10
Convicted criminals are being indulged during the execution of their prison sentences.	.34	.49	.11	-.15	-.05
An eye for an eye, a tooth for a tooth.	.39	.45	.07	.14	.01
Punishment is just desert.	.36	.43	-.08	.33	-.10
The role of the state in criminal proceedings should be reduced to that of mediator between perpetrator and victim.	-.20	-.10	.68	-.31	.10
Criminal law should, to a large extent, be transferred to the sphere of civil law.	-.32	-.13	.53	-.32	.09
The victim of a crime should be allotted a central position in criminal proceedings.	.15	.18	.53	-.18	.31
Criminal prosecution is superfluous in situations where offender and victim have, as a result of mutual consultation, arrived at a solution to the conflict.	-.10	-.14	.52	.05	.15
The resolution of conflict is a neglected goal within our criminal justice system.	-.32	.01	.31	.07	.10
The best form of punishment is one which, given the harm caused by the crime, maximises the possibilities for restitution and compensation.	.06	.05	.31	.04	.32
A criminal process can only be qualified as a success when both offender and victim are satisfied with the outcome.	-.04	-.13	.30	-.02	.26
The criminal justice system should accommodate the process of negotiation between offender and victim.	-.21	-.02	.30	.02	.17
The criminal justice system has removed too many responsibilities from the public.	-.28	.04	.49	.01	.02
General prevention leads to sacrificing the individual in favour of the public interest.	.01	-.13	.46	.04	-.17
Criminal justice should primarily be tailored to accommodate the victims of crimes.	.17	.25	.43	-.11	-.05

Table 4.2b Study I (law students): component loadings after orthogonal rotation (N=266, k=50)

Item	I	II	III	IV	V
For a great many offenders, it is safer for society to have them locked up rather than walking around freely.	**.68**	.04	.34	−.08	−.24
Convicted criminals are being indulged during the execution of their prison sentences.	**.58**	.01	.31	−.26	−.12
Most people who advocate reconciliation measures for perpetrators of offences attach little importance to the seriousness of the crimes committed.	**.57**	.03	.35	−.39	−.25
In punishing serious crimes of violence, the safety of citizens is of greater importance than the needs of the offender.	**.51**	.13	.37	−.13	−.35
The potential for general prevention should determine the severity of punishment.	**.50**	.16	.38	−.05	−.35
It is better to incarcerate known (regular) offenders for longer periods since this will prevent many crimes from taking place.	**.49**	.12	.22	−.12	−.34
An eye for an eye, a tooth for a tooth.	**.49**	−.03	**.49**	−.21	−.28
If there is even the slightest doubt that an offender with a compulsory Hospital Order may reoffend, he or she should be detained for as long as possible.	**.46**	.23	.30	−.09	−.34
The victim of a crime should be allotted a central position in criminal proceedings.	**.45**	.29	.11	.05	**−.24**
Criminal justice should primarily be tailored to accommodate the victims of crimes.	**.44**	.20	.20	−.07	−.30
The imposition of alternative sanctions decreases the safety of society.	**.40**	−.02	.28	−.24	−.12
In determining level of severity of a sentence, the opportunities for general prevention should be considered in full.	.35	.18	.27	.07	−.23
The criminal justice system should accommodate the process of negotiation between offender and victim.	−.07	**.57**	−.10	.14	.04
Criminal prosecution is superfluous in situations where offender and victim have, as a result of mutual consultation, arrived at a solution to the conflict.	−.05	**.56**	−.09	.04	.17
A criminal process can only be qualified as a success when both offender and victim are satisfied with the outcome.	.06	**.43**	.04	.12	−.01

Table 4.2c Study I (law students): component loadings after orthogonal rotation (N=266, k=50)

Item	I	II	III	IV	V
The best form of punishment is one which, given the harm caused by the crime, maximises the possibilities for restitution and compensation.	.23	**.39**	.26	.08	−.24
The resolution of conflict is a neglected goal within our criminal justice system.	−.04	**.38**	−.08	.04	.10
Delinquency is a problem of education and development.	.02	**.38**	.18	.25	.06
Punishment is deserved suffering.	.46	−.06	**.70**	−.13	−.41
Even for alternative sanctions the infliction of suffering should be a prominent feature.	.39	.00	**.69**	−.14	−.25
Infliction of suffering should be an explicit element in every sanction.	.29	−.02	**.66**	−.18	−.27
Punishment without an element of suffering is no punishment.	.23	−.10	**.63**	−.10	−.27
Punishment is just desert.	.40	.01	**.60**	.01	−.31
Punishment should primarily be retribution.	.42	−.02	**.57**	−.31	−.27
Only if it becomes more punitive can community service be a full-fledged sanction.	.06	.13	**.53**	−.17	−.21
The central focus of the criminal justice system should be on the principle of correction.	−.09	.12	−.10	**.65**	.09
It is not the function of the criminal justice system to reform criminals.*	−.04	.02	−.12	**.59**	−.07
Officials in the criminal justice system have the moral duty to help criminals to get back on the right track.	−.02	.09	.01	**.53**	−.05
In establishing type and severity of punishment, the possibilities for resocialisation should play a dominant role.	−.30	.20	−.16	**.48**	.32
It is unethical to allow the goal of resocialisation to determine sentencing.*	−.33	.08	−.26	**.46**	.19
Punishment restores the legal order in society disrupted by an act of crime.	.23	.00	.20	−.01	**−.65**
Punishment restores the 'moral balance' in society disrupted by a crime.	.11	−.03	.27	−.03	**−.65**
Justice is served at the moment that a perpetrator of an offence is punished.	.30	−.01	.35	−.07	**−.54**
The criminal justice system is an effective instrument for fighting crime.	.37	−.13	.08	.03	**−.44**

Table 4.2d Study I (law students): component loadings after orthogonal rotation (N=266, k=50)

According to this five-dimensional structure underlying responses to the attitude statements, summated rating scales were constructed. The items included in the scales are the same as the high loading items on the separate principal components in Table 4.2. To determine internal consistencies of the scales, item

analysis was carried out. Cronbach's Alpha was calculated for each separate scale.

Table 4.3 shows the scale labels, number of items included in each scale (k), means, standard deviations and Cronbach's Alphas. For theoretical reasons, three items were excluded from the rating scales. These items are noted at the bottom of table 4.3. The reported means and standard deviations were computed after the summated scales had been divided by their respective numbers of items. The table shows that, in this study, Deterrence yields an Alpha of 0.84, Desert 0.84, Restorative Justice 0.77, Moral Balance 0.70, and Rehabilitation 0.73. These Alphas indicate internal consistencies of the scales to be ranging from quite acceptable to good.

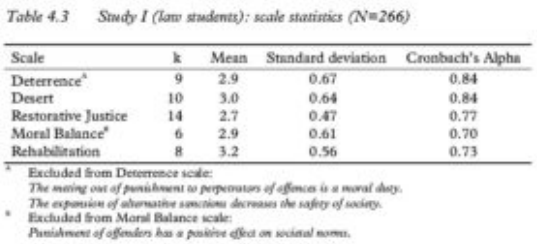

Table 4.3 Study I (law students): scale statistics (N=266)

Scale	k	Mean	Standard deviation	Cronbach's Alpha
Deterrence[a]	9	2.9	0.67	0.84
Desert	10	3.0	0.64	0.84
Restorative Justice	14	2.7	0.47	0.77
Moral Balance[a]	6	2.9	0.61	0.70
Rehabilitation	8	3.2	0.56	0.73

[a] Excluded from Deterrence scale:
The meting out of punishment to perpetrators of offences is a moral duty.
The expansion of alternative sanctions decreases the safety of society.
[a] Excluded from Moral Balance scale:
Punishment of offenders has a positive effect on societal norms.

Table 4.3 Study I (law students): scale statistics (N=266)

Results of Study I suggest that Deterrence and Rehabilitation, stemming from the utilitarian approach, are clearly distinguishable and measurable components in penal attitudes. The retributivist items form two separate attitude scales: restoring the Moral Balance and Desert. Attitude statements referring to the various components of Restorative Justice all converge on one Restorative Justice dimension. As such, Restorative Justice is the only approach among the three that can empirically be represented by a single homogeneous attitude scale. Empirically, restorative justice, therefore, seems to offer a more integrated account of punishment than the other approaches. Through the process of item analysis, the five summated rating scales were shown to be internally consistent.

One of the goals of this study was to identify deficiencies in the instrument. Reviewing the scales that emerged from the analyses, reveals that one of the central concepts in the utilitarian approach, Incapacitation, did not emerge as a separate dimension. Instead, most incapacitation items were among the 26 removed after the initial analysis. Further inspection of the original incapacitation

items led us to believe that the failure to reproduce this dimension is due to a flawed formulation of the relevant attitude statements. Since incapacitation is one of the central concepts in the utilitarian approach, it was decided to formulate a number of new Incapacitation-items for subsequent studies. The procedure adopted will be discussed in more detail in the next section.

The final question posed to the students asked them to report any difficulties they encountered in responding to the attitude statements. Almost 37 percent of the students responded to this question. Half of these responses were remarks concerning difficulties with the generalising and case-independent nature of the statements. This problem was anticipated in Section 4.2 above. Since all respondents conscientiously completed the questionnaires and response patterns appeared to be quite consistent and interpretable, the generalising nature of the statements seems to have been more of an annoyance to these students than a factor that seriously impeded the measurement. It was decided, however, that the generalising nature of the statements would need to be clearly justified and explained when dealing with judges in Dutch criminal courts.

In summary, the initial corpus of 76 items has been narrowed down to the 50 most adequate items. Principal components analysis and reliability analysis have shown these 50 items to form theoretically meaningful, readily interpretable and internally consistent scales for penal attitudes. However, new attitude statements pertaining to the utilitarian concept of incapacitation are required.

4.5 *Revision*

Before discussing procedure and results of the second study with law students, the formulation of a number of new Incapacitation items will first be discussed. This is an important step since the measurement instrument appeared to be seriously deficient in relation to this utilitarian concept.

The following procedure was used. A one-page questionnaire was distributed among all available colleagues at NISCALE (about 20). This number included some lawyers and a deputy judge. Some of the important general criteria which the formulation of attitude statements must meet (cf. McIver & Carmines, 1981; Swanborn, 1988) were first explained. Several examples of attitude statements were then given and the concept of Incapacitation was explained in some detail. Respondents were then asked to formulate one or more attitude statements pertaining to Incapacitation. This procedure produced 32 suggestions for

statements. These were thoroughly reviewed after which eight statements were finally selected.

The resulting new attitude statements were:
* To ensure the safety of citizens, perpetrators of serious crimes should be incarcerated for as long as possible.
* For a great many offenders, it is safer for society to have them locked up rather than walking around freely.
* In punishing serious crimes of violence, the safety of citizens is of greater importance than the needs of the offender.
* It is better to incarcerate known (regular) offenders for longer periods since this will prevent many crimes from taking place.
* Unless the perpetrator of a serious crime receives an unconditional prison sentence, he will continue to pose a threat to society.
* If there is even the slightest doubt that an offender with a compulsory Hospital Order may reoffend, he or she should be detained for as long as possible.
* Locking up serious offenders makes no difference for safety in the streets.
* Career criminals ought to be punished more severely than others. These new items were incorporated in the questionnaire for Study II.

4.6 *Study II*

Study II was carried out with three objectives in mind. First, replicability of the five scales developed in Study I would be examined. Second, this study would signify a renewed endeavour to measure the important utilitarian concept of Incapacitation. The third objective of this study was to use the results as the foundation for formulating a baseline model representing the structure of penal attitudes. As such, Study II was to further the development of a theoretically integrated model of penal attitudes which is examined in Chapter 6 with data collected from Dutch judges.

4.6.1 *Data collection and sample*

For Study II, data were collected from (criminal) law students at two universities other than those used in Study I. It concerned the University of Utrecht and the University of Amsterdam. In January 1997, with the help of faculty staff, 496 questionnaires were distributed among law students attending criminal law lectures. The questionnaire contained 58 items in random order: 50 items from Study I plus eight new Incapacitation items.**[xi]** As in study I, responses were to be given using five-point scales ranging from ‘completely disagree’ to ‘completely

agree'. Completed questionnaires were to be returned in pre-paid response envelopes. After returning the completed questionnaire, respondents received a giftvoucher with a monetary value of 10 Dutch Guilders (about U.S. $ 5).

The number of returned questionnaires was 296 in total, yielding a quite acceptable response rate of 60 percent. Table 4.4 shows response rates per university.

Table 4.4 Study II (law students): response per university, 1997

University	Distributed N	Received N	Response %
University of Amsterdam	196	133	68
University of Utrecht	300	163	54
	496	296	60

Table 4.4 Study II (law students): response per university, 1997

The average age of the law students in the sample was 23.2 (standard deviation 4.7) with 80 percent of the sample being between 18 and 24 years old. Furthermore, like in the first study, the majority (60%) of the law students was female. The proportion male to female students was roughly the same at both universities. The majority of respondents were either in their second (39%) or third (39%) year of law study. The remaining respondents were fourth year law students.

4.6.2 *Analysis and results*

The first goal of Study II was to examine the replicability of the rating scales extracted in the previous study. Five attitude scales, identical to those constructed in Study I, for Deterrence, Desert, Restorative Justice, Moral Balance, and Rehabilitation were formed and internal consistencies were re-examined. Furthermore, item analysis was carried out with the eight new Incapacitation items in an attempt to form an internally consistent rating scale for this concept.

Table 4.5 shows the scale labels, number of items included in each scale (k), means, standard deviations and Cronbach's Alphas. As in the previous study, reported means and standard deviations were computed after the summated scales had been divided by their respective number of items. Results indicate that although most Alphas have dropped somewhat in value in comparison to those in Study I, the scales retain quite acceptable to good internal consistencies, with Cronbach's Alpha's ranging from 0.68 to 0.82. In other words, the scales of

attitudes toward Deterrence, Desert, Restorative Justice, Moral Balance, and Rehabilitation, developed in Study I, have been shown to be replicable and to remain internally consistent with a different sample of law students.

Concerning the Incapacitation items, a scale including all eight items yielded a Cronbach's Alpha of 0.72. Item analysis, however, revealed two items with very low corrected item-total correlation (0.16 and 0.11). Excluding these two items significantly improved internal consistency of the scale, resulting in an Alpha of 0.79. The excluded items are shown at the bottom of Table 4.5.

Table 4.5 Study II (law students): scale statistics (N=296)

Scale	k	Mean	Standard deviation	Cronbach's Alpha
Deterrence	9	2.9	0.63	0.81
Desert	10	3.0	0.65	0.82
Restorative Justice	14	2.7	0.39	0.68
Moral Balance	6	2.9	0.61	0.70
Rehabilitation	8	3.2	0.53	0.68
Incapacitation[a]	6	3.3	0.70	0.79

[a] Excluded from Incapacitation scale:
Locking up serious offenders makes no difference for safety in the streets.
Career criminals ought to be punished more severely than others.

Table 4.5 Study II (law students): scale statistics (N=296)

In summary, theory-based attitude scales have been constructed, refined and replicated. The scales display good internal consistencies. The central constructs in the three moral theories of Utilitarianism, Retributivism and Restorative Justice are meaningful and measurable concepts in the minds of Dutch (criminal) law students.

The true litmus test for the tenability of this theoretically integrated measurement instrument, however, must lie in the measurement of penal attitudes among judges. The third objective of Study II was therefore to use these data as the foundation for a baseline model representing the structure of penal attitudes. To further validate the measurement instrument, confirm results of the two studies with law students and examine the structure of penal attitudes, the baseline model was to be tested with data collected from judges in Dutch criminal courts. The development of this baseline model of penal attitudes using data from Study II is discussed in the next section.

4.7 *Towards a structural model of penal attitudes*

This section discusses the development of a baseline model of penal attitudes. The model is tested in Chapter 6 as a 'structural equation model'. The purpose of

constructing a structural model of penal attitudes is twofold. First, based on the results of the studies with law students, an attempt will be made to empirically *confirm* the structure of penal attitudes using data obtained from judges in Dutch criminal courts. Second, it is believed that a model of this type will deepen theoretical and empirical insights in the structure of penal attitudes among criminal justice officials.

Since the anticipated sample size of the study among magistrates was fairly Limited**[xii]**, parsimony in the number of items to be selected for the structural model was an important concern. It was decided that factor analysis on the data of Study II using oblique ('direct oblimin') rotation of the axes would be the most appropriate technique for selecting items and modelling correlations between the underlying concepts. Factor analysis is the appropriate technique at this stage because it explicitly assumes the existence of an underlying theoretical structure. Analysis with oblique rotation allows for theoretically meaningful correlations between rotated factors. Furthermore, the analysis enables the researcher to formulate and apply objective criteria for excluding items.

Prior to the dimensional analysis, frequency tables of the separate items were inspected. Two restorative justice items**[xiii]** invoked relatively little variance in responses. Relatively few students agreed on these items while the others showed variations in degree of disagreement. Although these two items have been included in the Restorative Justice summated rating scale, the radical nature of these items was expected to invoke less variance among responses of Dutch judges relative to other Restorative Justice items. Given our concerns for parsimony in selecting items for inclusion in the structural model, the decision was made to exclude these two items from factor analysis and instead focus on items that were expected to invoke more variance in responses. The two Incapacitation items with low item to total correlations were also not considered for further analysis. The remaining 54 items were subsequently factor-analysed.

Concern for interpretability in combination with inspection of scree plots and eigenvalues (cf. Section 4.4.2) suggested a factor solution in five dimensions to be the most appropriate. This initial solution was very similar to the PCA solution of Study I (see Table 4.2), which is not surprising given the strong replicability of consistent rating scales reported in the previous section. To narrow down the set of items further, it was decided that to be included in further analyses, items would have to meet a factor loading of at least 0.35**[xiv]** on one of the five rotated

factors. Twelve items did not meet this criterion and were subsequently removed. The remaining 42 items were re-analysed, extracting five factors.

In the resulting factor solution, the five rotated factors explain 36% of the shared variance in responses to the 42 attitude statements. Table 4.6 shows the factor loadings (i.e. structure coefficients) of the items on each of the five rotated factors. While we constructed six internally consistent rating scales in the previous section, only five dimensions emerged from this factor analysis. Inspection of Table 4.6 reveals the reason for this finding. The first rotated factor collapses Deterrence and Incapacitation items. Apparently, the (new) Incapacitation items correlate to such a degree with Deterrence items that, even though both concepts could be represented by strong separate rating scales (see Table 4.5), they are collapsed on one and the same dimension. If we were to interpret this common underlying dimension, we would call it 'prevention through harsh treatment'.**[xv]** The second rotated factor is readily interpretable as a Restorative Justice factor.**[xvi]** The third factor represents Desert. The fourth factor covers Rehabilitation. The fifth and final factor is restoration of the Moral Balance.**[xvii]** Interpretation of this five-dimensional factor structure thus clearly concurs with results from Study I.

Table 4.6 Study II (law students): factor loadings after oblique rotation (N=296, k=42)

Item	I	II	III	IV	V
In order to deter a larger number of potential offenders, heavier sentences should be imposed in the Netherlands.	**.78**	–.20	.36	–.09	–.27
If heavier sentences were to be meted out, more potential offenders would be deterred than at present.	**.71**	–.15	.21	–.04	–.22
When criminal statistics show the prevalence of a particular offence to be increasing, the severity of punishment for that offence should also increase.	**.68**	.01	.30	–.16	–.19
To ensure the safety of citizens, perpetrators of serious crimes should be incarcerated for as long as possible.	**.63**	.20	.38	–.25	–.38
Heavy sentences increase the credibility of the criminal justice system.	**.62**	–.07	.38	–.14	–.28
Unless the perpetrator of a serious crime receives an unconditional prison sentence, he will continue to pose a threat to society.	**.61**	.18	.40	–.11	–.21

Table 4.6a Study II (law students): factor loadings after oblique rotation (N=296, k=42)

Item	I	II	III	IV	V
For a great many offenders, it is safer for society to have them locked up rather than walking around freely.	.60	.04	.34	−.08	−.24
Convicted criminals are being indulged during the execution of their prison sentences.	.56	.01	.31	−.26	−.12
Most people who advocate resocialisation measures for perpetrators of offences attach little importance to the seriousness of the crimes committed.	.57	.03	.35	−.30	−.25
In punishing serious crimes of violence, the safety of citizens is of greater importance than the needs of the offender.	.51	.13	.37	−.13	−.35
The potential for general prevention should determine the severity of punishment.	.50	.16	.38	−.03	−.35
It is better to incarcerate known (regular) offenders for longer periods since this will prevent many crimes from taking place.	.49	.12	.22	−.12	−.24
An eye for an eye, a tooth for a tooth.	.49	−.05	.49	−.21	−.28
If there is even the slightest doubt that an offender with a compulsory Hospital Order may reoffend, he or she should be detained for as long as possible.	.46	.23	.30	−.09	−.24
The victim of a crime should be allotted a central position in criminal proceedings.	.45	.29	.11	.05	−.24
Criminal justice should primarily be tailored to accommodate the victims of crimes.	.44	.20	.20	−.07	−.39
The imposition of alternative sanctions decreases the safety of society.	.40	−.02	.28	−.24	−.12
In determining level of severity of a sentence, the opportunities for general prevention should be considered in full.	.35	.18	.27	.07	−.23
The criminal justice system should accommodate the process of negotiation between offender and victim.	−.07	.57	−.10	.14	.04
Criminal prosecution is superfluous in situations where offender and victim have, as a result of mutual consultation, arrived at a solution to the conflict.	−.05	.56	−.09	.04	.17
A criminal process can only be qualified as a success when both offender and victim are satisfied with the outcome.	.06	.43	.04	.12	−.06

Table 4.6b Study II (law students): factor loadings after oblique rotation (N=296, k=42)

Item	I	II	III	IV	V
The best form of punishment is one which, given the harm caused by the crime, maximises the possibilities for restitution and compensation.	.23	.39	.26	.00	−.24
The resolution of conflict is a neglected goal within our criminal justice system.	−.04	.58	−.06	.04	.10
Delinquency is a problem of education and development.	.02	.30	.18	.20	.06
Punishment is deserved suffering.	.41	−.06	.78	−.13	−.41
Even for alternative sanctions the infliction of suffering should be a prominent feature.	.39	.00	.69	−.14	−.25
Infliction of suffering should be an explicit element in every sanction.	.29	−.02	.66	−.19	−.27
Punishment without an element of suffering is no punishment.	.23	−.10	.63	−.10	−.27
Punishment is just desert.	.41	.01	.60	.01	−.31
Punishment should primarily be retribution.	.42	−.02	.57	−.31	−.27
Only if it becomes more punitive can community service be a full-fledged sanction.	.46	.13	.53	−.17	−.21
The central focus of the criminal justice system should be on the principle of correction.	.09	.12	−.10	.63	.09
It is not the function of the criminal justice system to reform criminals.*	−.04	.02	−.12	.59	−.07
Officials in the criminal justice system have the moral duty to help criminals to get back on the right track.	−.02	.06	.01	.53	−.05
In establishing type and severity of punishment, the possibilities for resocialisation should play a dominant role.	−.30	.20	−.16	.48	.32
It is unethical to allow the goal of resocialisation to determine sentencing.*	−.33	.06	−.26	.46	.19
Punishment restores the legal order in society disrupted by an act of crime.	.23	.00	.20	−.06	−.68
Punishment restores the 'moral balance' in society disrupted by a crime.	.11	−.03	.27	−.00	−.65
Justice is served at the moment that a perpetrator of an offence is punished.	.30	−.01	.35	−.07	−.54
The criminal justice system is an effective instrument for fighting crime.	.37	−.13	.08	.05	−.44

Table 4.6c Study II (law students): factor loadings after oblique rotation (N=296, k=42)

Item	I	II	III	IV	V
By undergoing punishment, a criminal pays off his debt to society.	.19	−.02	.39	−.17	**−.44**
The meting out of punishment to perpetrators of offences is a moral duty.	.42	−.11	.36	−.06	**−.42**

Items designated by '*' have been recoded to reverse polarity.
Explained common variance: 36.1%.
Since factors are correlated (see Table 4.7), no percentages explained variance per factor are provided.

Table 4.6d Study II (law students): factor loadings after oblique rotation (N=296, k=42)

As mentioned above, for reasons of parsimony, results of these analysis were used to select a limited number of items for inclusion in the baseline model of penal attitudes. The selection of items was influenced by two counteracting considerations. On the one hand, selecting few items would mean too narrow a theoretical representation of the respective concepts. Selecting many items to represent each latent variable in the model, on the other hand, would, given limited sample size, be undesirable from a statistical point of view. It was therefore decided that for each factor five items with the highest loadings per theoretical construct would be selected. Since the counteracting considerations do not result in prescription of an exact number, the choice of five items per latent variable was the researcher's judgement-call.

The method of rotation allowed for theoretically relevant correlations between the factors. Substantial correlations between factors were to be utilised in formulating the baseline structural model of penal attitudes. Table 4.7 shows the factor correlation matrix.

Table 4.7 Study II (law students): factor correlation matrix (N=296)

	I Deterrence & Incapacitation: prevention through harsh treatment	II Restorative Justice	III Desert	IV Rehabilitation	V Moral Balance
Factor I	1.00				
Factor II	.06	1.00			
Factor III	**.42**	.04	1.00		
Factor IV	−.16	.15	−.14	1.00	
Factor V[a]	**.36**	−.02	**.33**	−.05	1.00

[a] Since all Moral Balance items had negative signs on the Moral Balance factor, positive and negative signs in the correlations with this factor have been swapped in order to facilitate interpretation.

Table 4.7 Study II (law students): factor correlation matrix (N=296)

Table 4.7 shows three *substantial* positive correlations (bold typeface) between rotated factors. They represent correlations between concepts that are clearly distinguishable but are generally associated with 'harsh treatment'. These

represent associations between Deterrence & Incapacitation, Desert and Moral Balance. These correlations were subsequently used for modelling associations between the latent variables in the baseline structural model of penal attitudes. Although the first factor in Table 4.7 covers both Deterrence and Incapacitation, the theoretical distinction**[xviii]** between these utilitarian concepts was considered to be important enough to justify their representation by two separate latent variables in the model. The closeness between these concepts was modelled through an added correlation between the respective latent variables in the baseline structural model. Furthermore, the factors correlating with factor I in Table 4.7, were subsequently modelled to correlate both with Deterrence and with Incapacitation. The baseline model thus includes six latent variables. Figure 4.2 presents the resulting baseline structural model of penal attitudes based on the analyses of student data. Table 4.8 shows the selected items with item numbers corresponding to those depicted in the structural model of Figure 4.2. This model is tested in Chapter 6 using data obtained from judges in Dutch criminal courts. Before doing so, however, Chapter 5 provides a brief outline of the legal context of the study.

Table 4.8 Items in the model of penal attitudes

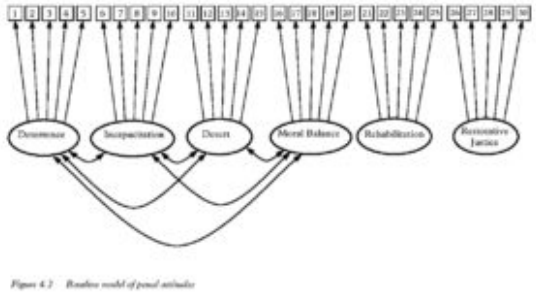

Figure 4.2 Baseline model of penal attitudes

NOTES

i. For instance, concepts like 'objectively valid morality' and 'subjective immorality' in Polak's retributive approach, or the notion of a social contract in Beccaria's utilitarian approach. See Chapter 2.

ii. The fact that some existing items were phenomenologically derived by the original researchers does not make our scales less theoretical because only those items were chosen that represented our theoretically selected concepts.

iii. In this text the terms rehabilitation and resocialisation are used interchangeably (see Chapter 2).

iv. See Feinberg (1970) for an extensive discussion of the expressive function of punishment.

v. A number of such core arguments from retributivism related to restoring the moral balance were reviewed and discussed in Section 2.4.3.

vi. I thank Ylan de Waard and Marjolein Weitenberg for their cooperation.

vii. I thank Hans Nijboer for his cooperation.

viii. Procedure and results of Study I have been previously published in De Keijser (1998).

ix. Factor Analysis using 'principal axis factoring' yielded the same results. Because our aim in this first empirical phase of the study is more explorative in nature, principal components analysis is reported.

x. The slope of the line through the eigenvalues decreased substantially after the fifth component. See Dunteman (1989) and Kim and Mueller (1978) for concise discussions of criteria for the number of components to retain.

xi. The three items that were excluded from the rating scales of Study I (see Table 4.3) were retained in the item pool for study II.

xii. This will be discussed in Section 6.2.

xiii. The role of the state in criminal proceedings should be reduced to that of

mediator between perpetrator and victim. Criminal law should, to a large extent, be transferred to the sphere of civil law.

xiv. Factor loadings refer to coefficients in the structure-matrix. These coefficients represent simple correlations of the variables with the factors. The choice for a minimum factor loading of 0.35 is, of course, somewhat arbitrary. However, with sample size 296, factor loadings need at least be 0.30 to be statistically significant at the 1% level (Stevens, 1996, p. 371). Because we had to deal with a large number of items, the choice of 0.35 as a cut off point seemed quite reasonable.

xv. This first factor is 'contaminated' with two Desert items (loadings 0.58 and 0.49) and two Restorative Justice items (loadings 0.45 and 0.44).

xvi. The item in this factor with the lowest loading (0.30) is a Rehabilitation item. This contaminating item has a loading of 0.26 on the Rehabilitation factor.

xvii. This last factor is contaminated by one Deterrence item which also has a substantial loading (0.37) on the first factor.

xviii. This is the distinction between individual prevention through incapacitation and general prevention through deterrence.